

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

WRIT PETITION NO.4201/2020

Gitabai Bhagwan Pardeshi
@ Geetabai Sanjay Rajput,
age 53 yrs., occu.agri., & household,
r/o village Jamdi Tq.Chalisgaon Dist.Jalgaon,
at present at Jangipura, Jamner
Tq.Jamner Dist.Jalgaon.

...Petitioner..
(Org.obstructionist/appellant)

VERSUS

1] Smt.Hirkanbai Aadhar Patil,
age 67 yrs., occu.household,

2] Mr.Deepak Aadhar Patil,
age 35 yrs., occu.business,

3] Mr.Sambhaji Aadhar Patil,
age 32 yrs., occu.business,

4] Sangeeta Babulal Patil,
Since deceased, through legal heir -
Jitendra Babulal Patil, age 20 yrs.,
occu.education,

All r/o village Talonde Digar,
Tq.Chalisgaon Dist.Jalgaon.

Nos.1 to 4 --
...Decree Holders...

5] Mr.Nandur Bhagwan Pardeshi,
age 38 yrs., occu.agri.,
r/o village Jamdi Tq.Chalisgaon
Dist.Jalgaon.

No.5 – judgment debtor

6] The State of Maharashtra,
through the Taluka Inspector of Land Records,
Chalisgaon Tq.Chalisgaon Dist.Jalgaon.

.....Respondents..

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Shri Mukul S. Kulkarni, Advocate for petitioner.
Shri S.R. Patil, Advocate for respondent nos.1 to 4.
Shri A.R. Kale, AGP for respondent no.6.

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CORAM: V.L. ACHLIYA, J.

DATE: 14.08.2020

ORDER :

1] Being aggrieved by order dated 18.2.2020 passed by learned Ad Hoc District Judge-3 & Assistant Sessions Judge, Jalgaon, in Regular Civil Appeal No.26/2020, the petitioner - objector preferred this petition under Article 227 of the Constitution of India. By the impugned order, the learned District Judge has rejected the application (Exh.5) seeking stay to order dated 11.2.2020 passed below Exhibit 59 in Regular Darkhast No.11/2017. By order dated 11.2.2020, the executing Court rejected the objection raised under Order 21 Rule 97 of the Code of Civil Procedure by the petitioner - objector to execution of decree passed in Regular Civil Suit No.270/2013 vide judgment and order dated 25.4.2013, which was confirmed by the first appellate Court in Appeal No.272/2013 as well as this Court in Second Appeal No.61/2017.

2] Heard learned counsel for the petitioner, respondent nos.1 to 4 and learned AGP for the respondent no.6. Perused the record and proceedings.

3] Learned counsel for the petitioner strenuously contended that in view of the challenge raised in appeal, the petitioner - objector has made out sufficient cause to stay the execution of decree as well as impugned order passed by the executing Court. It is submitted that the petitioner has good case to succeed in appeal. The decree of possession sought to be executed by the respondent nos.1 to 4 has been passed without making the petitioner as party - defendant in the suit. After the demise of father of the petitioner, the name of the petitioner alongwith respondent no.5 (original defendant in the suit) was mutated in 7/12 extract of the suit land in the column of possession in place of their deceased father. The entry to that effect was recorded in the year 2005. The respondent nos.1 to 4 - original plaintiffs though aware of this fact did not join her as defendant in the suit. So also the respondent no.5 (original defendant) also did not raise objection to that effect in the suit. It is submitted that after the demise of father of the petitioner, the petitioner is in joint possession of the suit property alongwith the respondent no.5 (original defendant). In absence of any decree passed against her to handover the possession of suit property, the decree is not executable. She, therefore, filed objection as contemplated under Order 21 Rule 97 of the Code of Civil Procedure. By impugned order dated 11.2.2020, the executing

Court rejected the objection without conducting enquiry as contemplated under Order 21 Rule 97 of the CPC. In that view, the order passed by the executing Court is not sustainable in law. In support of this submission, the learned counsel has referred and relied upon decision in the case of *Udyavara R. Acharya & another v. Jugal Kishor Jagannath Sharda* **(2020 SCC OnLine Bom.,798)**. It is contended that the appeal filed by the petitioner raises arguable case. If the execution of decree is not stayed, the very purpose of filing appeal would be defeated.

4] The respondent nos.1 to 4 have filed affidavit in reply and opposed the admission of petition with the contention that the petition raises no case to interfere in exercise of writ jurisdiction under Article 227 of the Constitution of India.

5] Learned counsel for the respondent nos.1 to 4 – original plaintiffs supported the impugned order. It is submitted that the petition filed is devoid of merits. The order passed suffers from no illegality, perversity and jurisdictional error so as to invoke powers of superintendence vested with this Court under Article 227 of the Constitution of India. By referring to overall facts of the case, the learned counsel submits that the decree seeking possession of the suit property has been confirmed upto this Court in second appeal preferred by the respondent no.5 - the brother of the petitioner. It is

submitted that the objection has been raised in gross suppression of true and correct facts. There is no evidence to show that the petitioner is in possession of the suit property. It is pointed out that the revenue entry in possession column taken after the death of father of the petitioner was set aside vide order dated 14.1.2015 passed in an appeal / revision preferred by the respondent nos.1 to 4 before the Sub Divisional Officer, Chalisgaon. Being aggrieved by order dated 14.1.2015, the petitioner alongwith her mother Sunderabai and brother - the respondent no.5 preferred appeal before the District Collector, Jalgaon. By order dated 21.7.2017 passed in R.T.S. Appeal No.60/2015, the learned Additional Collector, Jalgaon, dismissed the appeal and confirmed the order dated 14.1.2015 passed by learned Sub Divisional Officer. The order passed by the learned Additional Collector has attained finality.

6] By referring the objection raised by the petitioner, the learned counsel for the respondent nos.1 to 4 pointed out that the objection has been raised on the basis of alleged mutation entry recorded in the year 2005, which was subsequently set aside and deleted as per order dated 14.1.2015 passed in appeal and in that view, there is no merit in the objection raised by the petitioner. It is submitted that the said objection was raised at the instance of

respondent no.5 who lost the case upto this Court. Since the petitioner is not in physical possession of the suit property, there is no question of her dispossession on account of execution of decree. It is submitted that the objection has been raised with oblique motive to any how stall the execution of decree. It is submitted that it is a settled legal position that adjudication as contemplated under Order 21 Rule 97 of the CPC does not necessarily involve detailed enquiry and collection of evidence in each and every case. The executing Court can make adjudication on admitted facts or even on the averments made by resistor. In appropriate case, if Court deems it necessary, it can direct the parties to adduce evidence. In that view, there is no merit in the appeal filed by the petitioner. The appeal has been filed with a view to stall the execution of decree and deprive the respondent nos.1 to 4 to derive the fruits of the decree passed in their favour in a suit filed in the year 2005. It is submitted that order under Order 41 Rule 5 of the CPC is not empty formality. The appellate Court has to satisfy itself about the existence of 'sufficient cause' to stay the execution of decree / order. In that view, there is no merit in the petition.

7] I have carefully considered the submissions advanced in the light of challenge raised. The appeal preferred by the petitioner challenging the order passed by the executing Court is pending for

consideration before the appellate Court. In that view, it is not desirable for this Court to deal with the merits of case of the petitioner as well as respondent nos.1 to 4.

8] Since the petition is filed under Article 227 of the Constitution of India seeking exercise of powers of superintendence of this Court against the impugned order dated 18.2.2020 passed by the learned Ad Hoc District Judge, Jalgaon, the scope of enquiry vested with this Court is limited. It is settled position in law that exercise of jurisdiction under Article 227 of the Constitution of India is limited and restrictive in nature. Generally this Court is supposed to exercise its jurisdiction under Article 227 of the Constitution of India if the order under challenge suffers from jurisdictional error or error of law, findings are perverse or order has been passed in gross violation of principles of natural justice which resulted in causing manifest injustice to such party to petition. In exercise of powers under Article 227 of the Constitution of India, the Court is not supposed to sit in appeal so as to examine and correct the errors in the decision of the subordinate Court or Tribunal. The nature of power vested under Article 227 of the Constitution of India is more or less in the nature of exercise of revisional authority. Even the wrong decisions / orders made by subordinate Courts or Tribunals within the limits of jurisdiction vested in them are not

supposed to be interfered in exercise of powers of superintendence vested under Article 227 of the Constitution of India. In the case of *Essen Deinki v. Rajiv Kumar* reported at [**(2002) 8 SCC 400**], the Hon'ble Apex Court has considered the scope of exercise of jurisdiction under Article 227 of the Constitution of India and held as under:-

“Exercise of jurisdiction under Article 227 of the Constitution is limited and restrictive in nature. It is so exercised in normal circumstances for want of jurisdiction, errors of law, perverse findings and gross violation of natural justice to name a few. It is merely a revisional jurisdiction and does not confer an unlimited authority or prerogative to correct all orders or even wrong decisions made within the limits of the jurisdiction of the courts below. The finding of fact being within the domain of the inferior tribunal, except where it is a perverse recording thereof or not based on any material whatsoever resulting in manifest injustice, interference under the article is not called for.

It is clear that error must be that of law and patently on record committed by the inferior tribunal so as to warrant intervention. It ought not to act as a court of appeal.”

9] In the case of *Waryam Singh & another v. Amarnath & another* reported at **AIR 1954 SC 215**, the Hon'ble Apex Court has ruled that the powers of superintendence conferred by Article 227

are to be exercised most sparingly and only in appropriate cases in order to keep the subordinate Courts within the bounds of their authority and not for correcting mere errors.

10] Similarly, in the case of *Mani Nariman Daruwala @ Bharucha (deceased) through L.Rs. & others v. Phiroz N. Bhatena & others* reported at [**(1991) 3 SCC 141**], the Apex Court has held that powers under Article 227 of the Constitution of India can be invoked if the findings of inferior Court are perverse in law. In paragraph no.18, the Hon'ble Apex Court observed as under:-

“18. Was the High Court justified in taking this view and in upsetting the finding recorded by the appellate bench ? While considering this question it has to be borne in mind that the High Court was exercising its jurisdiction under Article 227 of the Constitution of India. **In the exercise of this jurisdiction the High Court can set aside or ignore the findings of fact of an inferior court or tribunal if there was no evidence to justify such a conclusion and if no reasonable person could possibly have come to the conclusion which the court or tribunal who has come or in other words it is a finding which was perverse in law. Except to the limited extent indicated above the High Court has no jurisdiction to interfere with the findings of fact.** (see: *Chandavarkar Sita Ratna Rao v. Ashalata S. Guram* **(1986) 4 SCC 447**). Applying these tests we are unable to persuade ourselves to hold that the findings

recorded by the appellate bench suffer from such an infirmity so as to justify interference with the said finding under Article 227 of the Constitution.”

11] By this petition filed under Article 227 of the Constitution of India, the petitioner has challenged the order passed by the appellate Court to refuse to grant stay to the execution of decree and order of rejection of objection filed under Order 21 Rule 5 read with Rule 8 by the executing Court. In that view, the challenge raised in appeal requires to be considered in a limited scope of exercise of powers of superintendence vested with this Court under Article 227 of the Constitution of India. The impugned order is challenged with contention that there is a strong case for appellant to succeed in appeal. The rejection of application seeking stay would frustrate the very purpose of filing of appeal. The petitioner has expressed apprehension that on account of refusal to stay execution of decree, the decree is likely to be executed which may lead to loss of possession of suit property which would result in substantial loss to petitioner.

12] In my view, the impugned order is reasoned and neither suffers from error in law nor can be termed as perverse in law. The order passed is well within the scope of exercise of judicial discretion vested with the appellate Court under Order 41 read with

Rules 5 & 8 of the Code of Civil Procedure. It is settled position in law that mere preferring of an appeal does not operate as a stay on the decree or order appealed against nor on the proceedings in the Court below. The only guiding factor indicated in Rule 5 of Order 41 of the Code of Civil Procedure to exercise the judicial discretion to consider the existence of 'sufficient cause' in favour of the appellant seeking stay to the execution of decree / order, as the case may be. While considering the stay application, the Court has to consider the substantial loss that may be occasioned to appellant if stay is not granted to decree / order, as the case may be. The threat of dispossession on refusal to grant stay is generally considered as substantial loss to the party applying for stay to execution under Order 41 Rule 5 of the Code of Civil Procedure. In the case of *Atma Ram Properties (P) Ltd. v. Federal Motors (P) Ltd.* reported at [**2005) 1 SCC 705**], the Hon'ble Apex Court has considered the scope of exercise of powers vested under Order 41 Rule 5 of the CPC and held that mere preferring of an appeal does not operate as stay. The appellate Court has discretion to grant stay or to refuse the same. The only guiding factor which governs the judicial discretion of the appellate Court indicated in Order 41 Rule 5 of the CPC is the existence of sufficient cause in favour of appellant, on the availability of which the appellate Court would be inclined to

pass an order of stay. It is also observed that the power to grant stay is a discretionary relief and flows from the jurisdiction conferred on an appellate Court which is equitable in nature. To secure an order of stay merely by preferring an appeal is not a statutory right conferred on the appellant. So also an appellate Court is not ordained to grant an order of stay merely because an appeal has been preferred and an application for an order of stay has been made. In this context, it is useful to refer the observations recorded by the Apex Court in paragraph nos.8 & 9 as under:-

“8. It is well settled that mere preferring of an appeal does not operate as stay on the decree or order appealed against nor on the proceedings in the court below. A prayer for the grant of stay of proceedings or on the execution of decree or order appealed against has to be specifically made to the appellate court and the appellate court has discretion to grant an order of stay or to refuse the same. The only guiding factor, indicated in Rule 5 aforesaid, is the existence of sufficient cause in favour of the appellant on the availability of which the appellate court would be inclined to pass an order of stay. Experience shows that the principal consideration which prevails with the appellate court is that in spite of the appeal having been entertained for hearing by the appellate court, the appellant may not be deprived of the fruits of his success in the event of the appeal being allowed. This consideration is pitted and weighed against

the other paramount consideration: why should a party having succeeded from the court below be deprived of the fruits of the decree or order in his hands merely because the defeated party has chosen to invoke the jurisdiction of a superior forum. Still the question which the court dealing with a prayer for the grant of stay asks itself is: why the status quo prevailing on the date of the decree and/or the date of making of the application for stay be not allowed to continue by granting stay, and not the question why the stay should be granted.

9. Dispossession, during the pendency of an appeal of a party in possession, is generally considered to be “substantial loss” to the party applying for stay of execution within the meaning of clause (a) of sub-rule (3) of Rule 5 of Order 41 of the Code. Clause (c) of the same provision mandates security for the due performance of the decree or order as may ultimately be passed being furnished by the applicant for stay as a condition precedent to the grant of order of stay. However, this is not the only condition which the appellate court can impose. The power to grant stay is discretionary and flows from the jurisdiction conferred on an appellate court which is equitable in nature. To secure an order of stay merely by preferring an appeal is not a statutory right conferred on the appellant. So also, an appellate court is not ordained to grant an order of stay merely because an appeal has been preferred and an application for an order of stay has been made. Therefore, an applicant for order of stay must do equity for seeking equity. Depending on

the facts and circumstances of a given case, an appellate court, while passing an order of stay, may put the parties on such terms the enforcement whereof would satisfy the demand for justice of the party found successful at the end of the appeal. In *South Eastern Coalfields Ltd. v. State of M.P.* **(2003) 8 SCC 648**, this Court while dealing with interim orders granted in favour of any party to litigation for the purpose of extending protection to it, effective during the pendency of the proceedings, has held that such interim orders, passed at an interim stage, stand reversed in the event of the final decision going against the party successful in securing interim orders in its favour; and the successful party at the end would be justified in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand (a) the delivery to it of benefit earned by the opposite party under the interim order of the High Court, or (b) compensation for what it has lost, and to grant such relief is the inherent jurisdiction of the court.”

13] The decision in the case of *Udyavara R. Acharya & another v. Jugal Kishor Jagannath Sharda* (supra) referred and relied upon by the learned counsel for the petitioner no way supports the case of the petitioner. In the ruling cited itself, the Court has recorded as under:-

“64. *Silverline Forum* has stressed that the words “all

questions arising between the parties to a proceeding on an application under Rule 97” would envelop only such questions as would legally arise for determination between those parties. In other words, the court does not have to determine a question merely because the resistor raised it. Succinctly stated, it is necessary that the questions raised by the resistor or the Obstructor must legally arise between him and the decree-holder. In the adjudication process envisaged in Order 21 Rule 97(2) of the Code, the execution court can decide whether the question raised by a resistor or Obstructor legally arises between the parties. That is, the executing court can decide whether the resistor or Obstructor is a person bound by the decree, and he refuses to vacate the property. That question also squarely falls within the adjudicatory process contemplated in Order 21 Rule 97(2) of the Code. In this context, it has held that:

The adjudication mentioned therein need not necessarily involve a detailed enquiry or collection of evidence. Court can make the adjudication on admitted facts or even on the averments made by the resistor. Of course the Court can direct the parties to adduce evidence for such determination if the Court deems it necessary.”

14] In my view, the reasons recorded by the appellate Court to refuse to grant stay cannot be termed as perverse in law. So also the order passed suffers from no jurisdictional error or error of law. The order passed is within the scope of exercise of powers vested

with the Court under Order 41 Rule 5 of the CPC. The order passed being discretionary in nature, this Court is not expected to interfere with the same in exercise of powers of superintendence vested with this Court under Article 227 of the Constitution of India.

15] Thus, on due consideration of the impugned order in the light of limited scope of exercise of powers vested under Article 227 of the Constitution of India, I am of the view that the impugned order calls for no interference in exercise of powers of superintendence vested with this Court. The impugned order passed by the appellate Court neither suffers from error of law nor amounts to jurisdictional error committed in exercise of its judicial discretion. So also the findings recorded cannot be termed as perverse in law causing miscarriage of justice to the petitioner. As discussed, in order to grant stay to the execution of decree / order, it is incumbent on the part of appellant to make out a case of existence of 'sufficient cause' and substantial loss if decree/order under challenge is not stayed. In the instant case, the petitioner has failed to make out that she is in physical possession of the suit property. She has not filed any suit or proceeding seeking declaration of her right in the suit property. The mutation entry on the basis of which she claims to be in joint possession of the suit property alongwith defendant no.5 has been set aside by the

revenue authority. The order passed in appeal preferred by the petitioner has attained finality. Only for the reason that the petitioner has preferred appeal, the appellate Court was not bound to grant stay to execution of decree which has been confirmed upto this Court. In that view, no case is made out to entertain the petition. I am, therefore, inclined to dismiss the petition. Accordingly, the petition is dismissed with no order as to costs.

16] At the request made by learned counsel for the petitioner, it is expressly made clear that this Court has not examined merits of case of the petitioner pending for consideration before the appellate Court and all contentions as to merits of case of the petitioner in appeal are kept open to be raised before the appellate Court.

(V.L. ACHLIYA, J.)