

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**CIVIL APPLICATION NO.9234 OF 2019
IN
CA/5253/2019 IN SA/243/2019**

Baburao @ Patilba s/o Pandurang Khatake,
Age 81 years, Occupation Agriculture,
R/o Borgaon-Thadi Tq. Gevrai Dist.Beed.

...Applicant/Orig. Respondent.

VERSUS

- 1) Baburao s/o Janabhau Lingse,
Age 70 years, Occupation Agriculture,
R/o Shevta Tq. Ghansavangi Dist.Jalna.
- 2) Baban w/o Janabhau Lingse,
Age 58 years, Occupation Agriculture,
R/o Shevta Tq. Ghansavangi Dist.Jalna.

...Respondents/Orig. Appellants.

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Advocate for Applicant : Mr. V. D. Salunke holding for
Mr. S. A. Gaikwad.
Advocate for Respondents : Mr. V. G. Mete.
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**CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 07-02-2020.**

ORDER :

1. In view of the order dated 08-01-2020 passed by the Hon'ble
The Senior Judge, Bench At Aurangabad, the application is assigned to
this Court.

2. Present application has been filed for vacating the interim relief passed in Civil Application No.5253 of 2019 dated 22-04-2019 in Second Appeal No.243 of 2019.

3. The present applicant is the original respondent in the second appeal whereas the respondents are the original appellants. The appellants have challenged the concurrent findings in Judgment and decree passed in Regular Civil Suit No.328 of 2006 dated 29-09-2016, by learned Civil Judge, Junior Division, Georai Dist. Beed which has then been confirmed in Judgment and decree passed in Regular Civil Appeal No.145 of 2016 dated 07-02-2019, by learned District Judge-5, Beed. The said second appeal has been admitted by formulating substantial questions of law on 22-04-2019 by this Court. On the same day order came to be passed on Civil Application No.5253 of 2019 which was for stay to the Judgment and decree passed in both the Courts. The stay was granted in terms of prayer Clause 'B' of the Civil application. The said prayer 'B' was as follows;

“B] Pending hearing and till the final disposal of the Second Appeal filed by the present applicants before this Hon’ble High Court, the execution, implementation and operation of the judgment and decree passed by the Ld. District Judge 5, Beed dated 07-02-2019 in Regular

Civil Appeal No.145 of 2016 and the Judgment and Decree passed by the Ld. Civil Judge, Jr. Division at Georai, dated 29-06-2016 in Regular Civil Suit No.328 of 2016 may please be stayed.”

4. The present applicant – original plaintiff had filed the said suit for specific performance of the contract. The applicant – original plaintiff in the present application submits that, by specific issue before the Trial Court itself a finding was given that he is in possession of the suit property on the basis of agreement to sell. It was also held that the defendants have caused obstruction to his possession over the suit land and, therefore, while passing the decree, the defendants were restrained from disturbing the peaceful possession of the plaintiff over the suit property i.e. Survey No.10/b/3 admeasuring 3 Acres 1 Guntha situated at Borgaon Thadi Tq. Georai Dist. Beed. When the defendants challenged the said Judgment and decree before the District Court, they had filed an application at Exhibit 5 for stay and while passing the order below Exhibit 5 on 20-01-2017, the learned Principal District Judge, Beed passed following order :

“Perused application Exh.5 and say. Heard both sides for a while. Having heard the learned Advocates for parties, the purpose will serve if the stay is granted to the extent of execution of sale deed in favour of respondent (original plaintiff), with a rider that appellants will not

create third party interest in the suit property. The relief is so granted because the learned Trial Court held that the respondent is in possession of the suit property and that directions are issued to appellants to execute the sale deed in favour of respondent, within three months from the date of decree. Both the Advocates have submitted that at present sale deed is not executed and that possession is continued with respondent. Petition Exh.5 is disposed of in terms of above.”

5. It has been contended by the applicants that, by taking disadvantage of the order dated 20-04-2019 by this Court, the defendants are now restraining him from cultivating the land. When in fact the defendants themselves had admitted before the learned Principal District Judge that the possession of the suit property is with the plaintiff and, therefore, the applicants are praying for vacating the stay, and in the alternative, they have prayed for the modification of the order.

6. The application has been resisted by the respondent No.2 by filing affidavit-in-reply which is nothing but the reproduction of record of this Court and as to how this Court had passed the order of removing the matter from board, and then when it was before another Bench, which orders have been passed. It is not necessary to reproduce any of the contents of the same. It is also stated that a detailed order regarding admitting the Second Appeal has been

passed and, therefore, question of vacating the interim relief does not arise.

7. Heard learned advocate Mr. V. D. Salunke holding for Mr. S. A. Gaikwad for applicant and learned advocate Mr. V. G. Mete for respondents.

8. In order to cut short it can be said that, both the learned advocates have reiterated the respective submissions which are appearing in the application as well as the affidavit-in-reply respectively. Further it can be said that, the learned advocate for the applicant fairly submitted that, there may not be vacating the order that was earlier passed by this Court in entirety, however it can be modified and the possession of the applicant–original plaintiff needs to be protected.

9. Per contra, the learned advocate appearing for the respondents – original appellant submits that, the amendment to the title clause has been allowed behind the back of the learned advocate and then he has carried out the amendment. The application was tried to be got circulated before the Bench which was not having the roaster and, therefore, the order of “remove

from board” was passed. Even the circulation note was given behind the back of the learned advocate and then the liberty was given to carry out the amendment. As per the practice mode he ought to have been intimated about the circulation note.

10. Important point to be noted is that, even if we accept for the sake of arguments that the learned advocate for the applicant ought to have intimated about the circulation to the learned advocate for respondent when the liberty to carry out amendment was given, from the record it can be seen that, the amendment that has been carried out is in respect of the relief that has been sought and correction in numbering of the paragraphs and addition of certain prayer which was in fact regarding vacating the interim relief granted by this Court. No prejudice could have been caused on that day even if intimation would not have been given to the learned advocate for the respondents. Ultimately notice will have to be issued and accordingly it has been issued to the respondents and no order affecting the interest of the respondents has been passed on that day, therefore, those submissions need not be addressed in detailed. It is to be noted that, a detailed order has been passed regarding admission of the Second Appeal which is filed by the

present respondents on 22-04-2019 and substantial questions of law have been framed. Since the Second Appeal was admitted, the application for stay was considered and the stay to the Judgment and decree passed in civil appeal was granted which had only stated that, the appeal stands dismissed. May be a fact that, inadvertently the decree in respect of the injunction was not considered by this Court while considering the application for stay at the time of admitting the second appeal. However the fact remains that, the Trial Court while decreeing the suit had restrained the defendants from disturbing the peaceful possession of the plaintiffs over the suit property, and when the respondents–original defendants had filed appeal and preferred application for stay, it appears that even the learned advocate who was representing them before the District Court had admitted that, possession of the suit land is continued with the respondent therein i.e. original plaintiff. Now the present respondents cannot make a hue and cry for taking note of the said fact. When the possession of the present applicant–original plaintiff was protected throughout the appeal also, which was filed by the present respondents before the District Court, then that possession deserves to be protected till the disposal of the second appeal also which has now been admitted. Hence, the interim relief granted by

this Court in Civil Application No. 5253 of 2019 on 22-04-2019 deserves to be modified. Hence, following order.

ORDER

- (1) Application is hereby partly allowed.
- (2) The order passed by this Court on 22-04-2019 in Civil Application No.5253 of 2019 is hereby modified as follows ;

“In view of the fact that the Second Appeal is admitted, there shall be stay in respect of execution of sale deed as directed in Regular Civil Suit No.328 of 2006 by Civil Judge, Junior Division, Georai on 29-09-2016. In other words, the stay is granted to the execution of sale deed only and the possession of the suit property to continue with the original plaintiff, and so also there is no stay to the decree of injunction granted in Regular Civil Suit No.328 of 2006, by learned Civil Judge, Junior Division, Georai on 29-09-2016.

**(SMT. VIBHA KANKANWADI)
JUDGE**

vjg/-