

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 4612 OF 2021

Devidas Laxman Navale,
Age : 37 Years, Occu Agriculture,
R/o. Velhale, Tal. Sangamner,
Dist. Ahmednagar

..PETITIONER
(Original Defendant 7)

VERSUS

1. Tahasildar, Sangamner,
Dist. Ahmednagar.

2. Sulochana Laxman Navale,
Age : 66 Years

RESPONDENTS
(Ori. Plaintiffs No.1 & 2)

3. Sanjay Laxman Navale,
Age : 43 Years

4. Laxman Namdeo Navale,
Age : 70 Years

(Original Defendants

5. Sangita Kailas Ambre,
Age : 45 Years, Occ. Service,
R/o. Hivargaon-Ambre,
Tq. Sangamner Dist. Ahmednagar

1 to 6 & 8 to 10
respectively

6. Sumanbai Laxman Navale,
Age : Major

7. Vatsalabai Laxman Navale,
Age : Major

8. Bhagubai Sukhdeo Vadekar,
Age : Major, R/o. Ashvi (Bk),
Tal. Sangamner, Dist. Ahmednagar
9. Bebi Madhukar Sonawane,
Age : Major
10. Sandip Laxman Navale,
Age : Major
11. Janabai Navnath Davare,
Age : Major, R/o. Khambala,
Tal. Sinnar, Dist. Nashik
12. Archana Vilas Narode,
Age : Major, R/o. Saikhindi
Tal. Sangmner, Dist. Ahmednagar

Occupation of Respondents No 2 to 4
and 6 to 12 is Agriculture. Respondents No.2
& 3 R/o. Vadgaonpan Tal. Sangmner,
Dist. Ahmednagar. Respondents No. 4,6, 7,9,
10 R/o Velhale, Tal. Sangmner,
Dist. Ahmednagar.

..RESPONDENTS

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Mr. V.Y. Bhide, Advocate for the Petitioner.

Mr. A.A. Jagatkar, A.G.P for Respondent-State.

Mr. Vijay Deshmukh, h/f S.S. Dixit, Advocate for respondents
No. 2 and 3.

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CORAM : SANDEEP K. SHINDE J.
DATE : 03 JULY, 2021

ORAL JUDGMENT :-

1. Heard Mr. V. Y. Bhide, learned counsel for the petitioner and Mr. Vijay Deshmukh holding for Mr. Satyajeeet Dixit. learned counsel for respondents No.2 and 3.

2. Partition suit bearing Regular Civil Suit No. 429 of 2009 instituted by respondents No.2 and 3 was decreed by the Court of Civil Judge, Senior Division, Sangmner. The decree was carried/ challenged in appeal bearing Regular Civil Appeal No. 43 of 2019 by the petitioner.

3. Admittedly, out of three suit properties one situated at village Velhale Tq. Sagmner; second at village Ghulewadi Tq. Sagmner and third at village Gunjalwadi Tq. Sagamner are in possession of the petitioner. Petitioner-defendant, resisted the suit contending that in previous partition these, three properties had fallen to his share. This defence was turned-down by the trial Court and decreed the suit.

4. In appeal, against the partition decree, learned Appellate Court, in exercise of its powers under Order 41 Rule 5(3) of C.P.C imposed following conditions vide Common Order

passed :-

“2. The execution of decree made in R.C.S. No. 429/2019 is stayed only to the extent of handing over possession, till determination of this appeal on its merit subject to condition precedent of giving security in the form of deposit in sum of amount of money of the suit property valuation determined from the Sub-Registrar Office, Sangamner.

3. The appellant is directed to furnish the valuation of the suit property determined from the Sub-Registrar Office, Sangamner within 15 days.

4. This order of stay to the execution of decree shall stand vacated upon the failure of the appellant/ plaintiff to furnish valuation and make deposit of the aforesaid security amount within 15 days thereafter.

5. The Revenue Authorities are directed continue partition process so as to complete all procedural formalities regarding partition of the immovable properties. ”

5. This order is challenged before this Court. Clause 3 of sub rule 3 of rule 5 of order 41 Code of Civil Procedure reads as under :-

(3) No order for stay of execution shall be made under Rule 1 or sub-rule (2) unless the Court making it is satisfied.

(c) That security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

6. Herein, decree appealed is decree in partition suit which only decides the right of the 'parties' and share. Equities are adjusted at the stage of final decree after taking into consideration the tentative or provisional partition scheme. This being the position in my view the learned appellate Court, incorrectly applied provisions of order 41 Rule 5(3) to the facts of the case. So far as sub Rule (5) of Rule (I) is concerned, it prohibits stay of execution of money decree unless decretal amount is deposited or security furnished. Here, decree appealed was not a money decree. Be that as it may, Apex Court in the case of *SIHOR NAGAR PALIKA BUREAU VS. BHABHULBHAI VIRABHAN & CO. (2005) 3 Supreme Court Cases 1*, has held, thus ;

6. Order 41 Rule 1(3) CPC provides that in an appeal against a decree for payment of amount the appellant shall, within the time permitted by the appellate court, deposit the amount disputed in the appeal or furnish such security in respect thereof as the court may think fit. Under Order 41 Rule 5(5), a deposit or security, as abovesaid,

is a condition precedent for an order by the appellate court staying the execution of the decree. A bare reading of the two provisions referred to hereinabove, shows a discretion having been conferred on the appellate court to direct either deposit of the amount disputed in the appeal or to permit such security in respect thereof being furnished as the appellate court may think fit. Needless to say that the discretion is to be exercised judicially and not arbitrarily depending on the facts and circumstances of a given case. Ordinarily, execution of a money decree is not stayed inasmuch as satisfaction of money decree does not amount to irreparable injury and in the event of the appeal being allowed, the remedy of restitution is always available to the successful party. Still the powers is there, of course a discretionary power, and is meant to be exercised in appropriate cases.

7. In consideration of the facts of the case and proposition of law laid down in the case of Sihor Nagar Palika (supra) impugned order is quashed and set-aside. However, pending Civil Appeal, Petitioner/appellant shall

not create third party rights in the suit properties. Needless to say process of partition shall go on but handing over share in the properties is deferred till the decision in Regular Civil Appeal No. 43 of 2019.

8. Writ petition is allowed in the aforesaid terms and disposed of.

(SANDEEP K. SHINDE, J.)

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