

(1)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO.5777 OF 2021
IN
SECOND APPEAL NO.805 OF 2013
WITH
CIVIL APPLICATION NOS.10636/2015 & 14893/2013

Raosaheb Yesba Sartape = APPLICANT
(Appellant/Orig.
plaintiff)

VERSUS

1. Balveer Shankar Sartape
and Ors. = RESPONDENT/S

Mr.SV Natu,Advocate for Applicant;

Mr.Sanjay Kumar Chavan, Adv. h/for Mr.SS Halkude,
Advocate for Respondent Nos.2 & 3.

CORAM : SMT.VIBHA KANKANWADI,J.

RESERVED ON : 06/07/2021

PRONOUNCED ON : 13/07/2021

PER COURT :-

1. Present application has been filed by the applicant/appellant in the Second Appeal for quashing and setting aside the order passed by learned Civil Judge, Junior Division, Ausa, District Latur on 3.11.2020 in Regular Darkhast No.23/2009.

2. Before considering the application, background thereof is required to be considered. The present applicant/appellant is the original

(2)

plaintiff, who had filed RCS No.288/1994 for perpetual injunction in respect of house property bearing No.12/1, 12/2 and 12/3, admeasuring 41.44 sq.feets at village Sindalwadi, Tq. Ausa, District Latur.

3. Defendant Nos.1 to 3 filed their written statement and also filed counter-claim. The present appellant/applicant had filed the written statement to the counter claim. The parties led evidence and the learned Civil Judge, Junior Division, Ausa, by decree dated 20th December, 2008, partly decreed the suit. The defendants were perpetually constrained from causing obstruction to the possession of the plaintiff over the middle portion of the suit property, which has been described in the decree itself. Further, it is to be noted that the counter claim of the defendants was also allowed and the plaintiff was directed to remove his illegal construction over 1/3rd space from the western side in the suit property. The said decree was challenged by the plaintiff by filing Regular Civil Appeal No.3/2009 before the learned District Judge-2, Latur. By judgment and decree dated 24.9.2013, the said appeal came to be dismissed.

(3)

Hence, the plaintiff filed Second Appeal No. 805/2013 before this Court.

4. This Court, by order dated 28th January, 2014 admitted the Second Appeal by framing substantial question of law. On the same day, an interim order, in terms of prayer clause (A) in respect of the stay to the decree, that was passed against the appellant in the Second Appeal, i.e. original plaintiff, was passed and notices were issued to the respondents, making them returnable on 11th March, 2014.

5. Heard learned Advocates appearing for the respective parties.

6. It has been vehemently submitted on behalf of the applicant-appellant that this Court has granted stay to the impugned decree which was against the plaintiff. However, the execution proceedings filed by the defendants, were pending before the Executing Court. When this court had not specifically stated that the ad-interim stay was granted for a particular period, then it ought to have been considered by the learned Executing Court that it is till further orders on merits. However, the execution proceedings were on Board on

(4)

3.11.2020 before the Executing Court and on that day, an order came to be passed, taking a note of the decision of the Hon'ble Apex court in the matter of Asian Resurfacing of Road Agency Private Limited and Anr. Vs. Central Bureau of Investigation – (2018) 16 SCC 299, wherein specific directions were given and it was directed that in all pending matters before the High Courts or other Courts relating to the Prevention of Corruption Act or all other Civil or Criminal cases, where stay of proceedings in a pending trial is operating, stay will automatically lapse after six months from today (on the day the judgment was pronounced by the Hon'ble Apex Court) unless extended by a speaking order and the same course was directed to be adopted by Civil and Criminal Appellate/Revisional Courts under the jurisdiction of the High Courts. It was held by the learned Executing Court that in view of the ratio laid down by the Hon'ble Apex Court, whatever stay was granted by this Court had automatically expired and the directions were given to proceed the matter further. It has been submitted that the learned Executing Court has wrongly interpreted the said

(5)

decision and made it applicable to the execution proceedings, when in fact, those directions were to the Trial Courts where Trial was stayed. Under such circumstance, the said order deserves to be quashed and set aside.

7. An affidavit in reply has been filed by Respondent Nos.2 and 3 and they have taken objection. It has been stated that the said decision has been rightly interpreted by the learned Executing Court. The said order passed by the Hon'ble Apex Court is very much applicable to all the proceedings in Civil and Criminal, including execution proceedings. It has been further submitted by the learned Advocate for the respondents that the execution proceedings cannot be exempted from the trial proceedings. The stay that was granted by this Court on 28th January, 2014 was ex-parte and it was an ad-interim order. It could not have been in perpetuation. Civil Application No.10636/2015 for vacating the said order is pending which is filed by the present respondents. The respondents have every chance in the Second Appeal and, in fact, the alleged substantial question of law ought not to have been

framed by this Court and since it is framed ex-parte, the ad interim order/stay deserves to be vacated. So also, the course, that is adopted, taking into consideration the decision of the Hon'ble Apex Court in Asian's case (supra), by the Executing Court, is perfectly correct.

8. At the outset, a fact is required to be observed that in view of the judgment in Ashok Rangnath Magar Vs. Shrikant Govindrao Sangvikar - (2015) 16 SCC 763, the Hon'ble Apex Court held that Second Appeal can be dismissed even without formulating the substantial questions of law. It has been held thus, -

"18. In the light of the provision contained in Section 100 Civil Procedure Code and the ratio decided by this Court, we come to the following conclusion:-

(i) On the day when the second appeal is listed for hearing on admission if the High Court is satisfied that no substantial question of law is involved, it shall dismiss the second appeal without even formulating the substantial question of law;

(ii) In cases where the High Court after hearing the appeal is satisfied that the substantial question of law is involved, it shall formulate that question and then the appeal shall be heard on those substantial question of law, after giving notice and opportunity of hearing to the respondent;

(iii) In no circumstances the High

(7)

Court can reverse the judgment of the trial court and the first appellate court without formulating the substantial question of law and complying with the mandatory requirements of Section 100 Civil Procedure Code."

9. The above said procedure has been adopted in this case and, therefore, it was not necessary to hear the respondents, if the substantial question of law has been successfully pointed out by the appellant and accordingly it has been framed by this Court. This Court has framed the following substantial question of law, -

"i] Did the appellant/plaintiff succeed in proving title by adverse possession to the western 1/3rd portion of the suit house ?

10. Civil Application No.14893/2013 for stay was filed in which following order has been passed on 28th January, 2014,

" Heard.

2) Issue notice to respondents, returnable on 11th March, 2014.

3) There shall ad-interim order in terms of prayer clause (A)."

11. It can be said that when the wording "ad-interim" has been used by this Court and the Notice is made returnable, then the matter ought to have

come up on Board on the returnable date and it cannot be said that this Court, on the day when the said ad-interim protection was granted to the applicant, was of the view that the said interim arrangement should continue till decision of the Second Appeal. If that would have been the intention, then there would have been those specific wordings. Though this Court has stated that there shall be ad-interim order in terms of prayer clause (A) and if we see the prayer clauses, then it can be seen that ad interim relief in terms of prayer clause (A) was sought by the applicant in prayer clause (B) and not (A). Prayer clause (A) relates to allowing the Civil Application and during pendency of the Second Appeal there should be stay to the execution of the decree. At the cost of repetitions, it can be said that on 28th January, 2014, the entire application has not been allowed by this Court. If it would have been allowed in terms of prayer clause (A), then there was no point in issuing notices of the application to the respondents therein, making them returnable on a particular date. Thus, what has been granted is prayer clause (B) and not (A) and, therefore, it

was, in fact, till the returnable date only.

12. Another fact which is to be observed in this case as well as it has been observed in many other cases that when such orders are passed, many a times, those cases do not appear on the Board on the returnable date. We do not want to go into the reasons therefor. But, suffice it to say that it would be for the learned Advocates to take steps and if there is reason or need to get a speaking order, then they should move the Court immediately. No such instance or thing has taken place in this case. Further, the respondents are also equally responsible in this case for the simple reason that they have filed the Civil Application No.10636/2015 for vacating the stay. But, they did not get it circulated till 2018. Further, it appears that once it was on Board, but with consent, it was adjourned and since 19.7.2018, that application has also not been got circulated. Therefore, taking into consideration this action (including inaction on the part of Respondent Nos.2 and 3) it would allow this Court to interpret that the respondents are also having impression that this Court has granted a blanket stay; otherwise they would have moved the

Executing Court very much earlier. Important point to be noted is that the execution proceedings have been filed in the year 2009 itself. That means, immediately after the Trial Court, i.e. Civil Judge, Junior Division, had passed the decree, it was filed. The Appellate Court has decided the Regular Civil Appeal on 24.9.2013 and it can be seen for the obvious reason that till the decision in the appeal, the further proceedings before the Executing Court would have been stayed. Therefore, this Court is not in agreement with the learned Advocate Mr. Natu, appearing for the applicant-appellant, in respect of his submission that the blanket stay was granted by this Court on 24.1.2014. That application is still pending.

13. Now, coming to the impugned order, it is to be noted from the said order that no application was moved by the decree-holder/s on that day for vacating the stay. It appears that whatever order was passed by the learned Executing Court on 3.11.2020, is a *suo motu* action. If the learned Judge of the Executing court was of the opinion that the matter should progress, then he ought to have given an opportunity to both the sides to make

their submissions.

14. This Court intends to impress upon all the Judges that if they want to rely upon a particular judgment/decision, then there is no hurdle for them to bring that ratio/decision to the notice of the concerned Advocates and giving them opportunity to make their own submissions. In fact, the Judges shall not take any such step which will surprise the parties and/or their Advocates. There may be possibility of some other interpretation or there may be some another decision than the decision which the learned Judge wants to rely upon or the said decision might have been explained in another decision and such fact can be pointed out by the Advocates. The Advocates being Officers of the Court, would definitely assist the Courts in arriving at a particular conclusion. No such opportunity appears to have been given by the learned Executing Court in this case and then he went on to pass the order, interpreting that, whatever stay has been granted by this Court, has automatically come to an end in view of the ratio laid down in Asian's case (supra).

15. At the cost of repetitions again this Court would like to say that even defendant Nos.2

and 3, i.e. present respondent Nos. 2 and 3, were also not having that interpretation that the stay granted by this Court had automatically ceased to operate. Another fact is required to be noted is that the Asian's case (supra) was decided by the Hon'ble Apex Court on March 28, 2018. If the said ratio was to be made applicable then the stay, which was granted by this Court, would have automatically come to an end after six months from 28th March, 2018. Even after that date, there was no step taken by the present Respondent Nos.2 and 3 for the execution. If we consider the observations made by the Hon'ble Apex Court in para 36 in Asian's case (supra), it can be said that those directions are relating to the pending trials, which have been stayed by the Appellate Courts when it is observed, -"...In an attempt to remedy this situation, we consider it appropriate to direct that in all pending cases where stay against proceedings of the civil or criminal trial is operating, the same will come to an end on expiry of six months from today unless in an exceptional case by a speaking order such stay is extended." (*emphasis supplied*). In the entire

decision, the situation, where the stay is granted to the judgment and decree or relating to execution proceedings, has not been specifically stated. Further, everywhere the words used are "Trial Court".

16. It is a legal situation that the appeals are continuation of trials. But as regards the execution proceedings are concerned, they will have to be treated on a different footing. Further, when the Second Appeal is admitted and the decree, that was stayed by the ad-interim order, was in respect of removal of the alleged encroachment, and if it is taken that that stay has automatically come to an end, then it may affect the second appeal itself. This Court would refrain itself from making any further observations as the stay application is still pending. So also the application for vacating the stay order is also pending.

17. Further, while deciding Miscellaneous Application No.1577 of 2020 in the same case, i.e. Asian Resurfacing of Road Agency Pvt. Ltd. And Anr. (supra) on 15th October, 2020, the Hon'ble Apex Court had given further directions and has

reiterated that all the Magistrates all over the country will follow the order especially Para No.35 of the earlier judgment, in its letter and spirit and it appears that this prompted the Executing Court to pass the said order on 3.11.2020. However, the further observations made by the Hon'ble Apex Court on 15th October, 2020 in the said case, are required to be considered, which are thus, - "... Whatever stay has been granted by any court including the High Court automatically expires within a period of six months, and unless extension is granted for good reason, as per our judgment, within the next six months, the trial Court is, on the expiry of the first period of six months, to set a date for the trial and go ahead with the same." This would clarify that those directions are in respect of the stay to the trial and not the execution proceedings and, therefore, it appears that the said decisions in Asian's case (supra), either that was pronounced on 28th March, 2018 or 15th October, 2020, referred to above, appear to have been misunderstood by the learned Executing Court for making it applicable to the execution proceedings and, therefore, that order

(15)

deserves to be set aside and it is accordingly set aside.

. However, it is clarified that since the stay application as well as the application for vacating the stay order passed by this Court on 28th January, 2014, are still pending, place those Civil Applications for hearing on 15th July, 2021 and till they are decided, there shall be stay to the further proceedings in Regular Darkhast No.23/2009, pending before the Civil Judge, Junior Division, Ausa.

(SMT. VIBHA KANKANWADI)
JUDGE

BDV