

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 11470 OF 2017

Dnyaneshwar Sukhdev Ingavale

(Since Deceased through his legal heirs)

1A) Indubai Dnyaneshwar Ingavale & Ors.

... Petitioners

Vs.

Kamal Vitthal Bhandare & Ors.

... Respondents

.....

Mr. Sagar Anant Joshi for the Petitioners.

None for the Respondents.

.....

CORAM: MADHAV J. JAMDAR, J.

DATE : 4th AUGUST, 2021.

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1. Heard Mr. Sagar Joshi learned Advocate for the Petitioners who are the original Appellants -Defendants.

2. None appears for the Respondents although duly served.

3. This Court by order dated 30th October, 2017 issued notice to the Respondents and made the same returnable on 27th November, 2017. The office note shows that the Respondent Nos. 1 to 5 and 7A to 7C are duly served and in the title of petition itself it is mentioned that Respondent No. 6 expired in 1990 i.e. prior to filing of the suit.

4. It appears that inspite of service, none appeared for the

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Respondents and therefore, this Court by order dated 28th February, 2019 issued fresh notice to the Respondents and made the same returnable to 29th April, 2019. The office note dated 8th November, 2019 shows that notice to Respondent Nos. 1 to 5 and 7A to 7C is duly served. Thus, it is very clear that inspite of notice the Respondents are not appearing.

5. The Petitioners have filed Civil Miscellaneous Application No. 162 of 2016 seeking condonation of delay in filing Appeal and also filed another application seeking stay to the execution of the decree. The R.C.S. No. 157 of 2012 filed by the plaintiffs was decreed on 28th June, 2013. The said suit was filed by the Respondent No.1.

6. Mr. Joshi, learned counsel appearing for the Petitioners submitted that by the said decree it has been declared that original Plaintiff -Respondent No.1-Kamal Vitthal Bhandare is having 1/11 share in the suit properties and further decree of partition by metes and bounds and of separate possession is passed.

7. Mr. Joshi, submitted that the Petitioners are only aggrieved by Clause (2) of the impugned order. The Clause (2) and (3) of the impugned order are as follows:-

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2) Applicants are directed to deposit Rs.2,50,000/- before executing Court as security of share of original plaintiff within period of three months from today. On depositing amount it be kept in fixed deposit in any Nationalized Bank. Plaintiff will get interest on fixed deposit amount till attending finality of litigation between parties.

3) On compliance of the condition by applicants stay is granted to the execution which will remain in force till final decision of appeal after it's registration.

8. Mr. Joshi submitted that the decree which was impugned before the Lower Appellate Court is only of determining shares and of partition and not the money decree. He thus contended that the learned Lower Appellate Court erred in imposing the aforesaid condition. In support of his contention, Mr. Joshi has relied on the judgment of this Court reported in ***2017 0 Supreme (Mah) 393 in case of Kisna Ganpat Sawarkar Vs. Shri Bhaurao @Lahanu s/o. Ganpat Sawarkar***. He submitted that in similar circumstances this Court set aside the order imposing conditions. The relevant portion of the said judgment is set out hereinbelow:-

"3] The petitioner has preferred Regular Civil Appeal No. 162 of 2014, which is pending for adjudication. An application Exh. 6 was filed before the lower appellate Court for stay of the decree. On 11.03.2015, the lower appellate Court passed an order, the operative portion of which is reproduced below.

"[1] The application Exh.6 is allowed.

[2] The effect, operation and execution of the judgment and decree passed by the learned Civil Judge, Jr. Dn. (Jt. Court), Seloo, in R.C.S. No. 20/2010 on 09.06.2014, is stayed till the disposal of the appeal subject to the condition that the appellant shall deposit Rs.30,000/ in this Court within the

period of four weeks from today. Further, the appellant shall also deposit Rs.10,000/ per year in this Court on or before 1st day of February of each year till the decision of this appeal.

[3] Hamdast allowed"

4] It is a usual decree for partition and separate possession. There is no decree for monetary claim. It is not in dispute that there is no enquiry into the mesne profit ordered by the trial Court. It is not understood as to on what basis the lower appellate Court puts conditions of deposit of the amount. The question of directing the petitioner by interim order to deposit an amount of Rs.30,000/ in the Court and to further continue to deposit Rs.10,000/ per year does not at all arise. The order to the extent imposing condition cannot, therefore, sustained and it has to be quashed and set aside.

5] Normally, the appellate Court should not stay the proceedings under Section 54 of Civil Procedure Code after a decree for partition and separate possession, as it takes time. The lower appellate Court in this case should not have stayed the execution of the decree for partition. Hence, the proceedings for partition may go on. However, the possession of the parties shall not be disturbed and at the conclusion of such proceedings, the parties shall be at liberty to approach the lower appellate Court, either for grant of hearing finally or for vacating the interim order.

6] The amount of Rs.20,000/ deposited by the petitioner is directed to be withdrawn by the petitioner along with interest, if any, accrued thereon."

9. Perusal of the impugned order 23rd February, 2017 shows that the said Civil Miscellaneous Application No. 162 of 2016 was filed for condonation of delay. The same is allowed with cost. The said order is not challenged by the Respondents. By the impugned order Exhibit-5 application filed in the Regular Civil Appeal No. 52 of 2017 pending in the District Court, Pune is allowed by imposing above referred conditions.

10. The judgment on which learned counsel for the Petitioners has relied, is squarely applicable to the present case.

11. It is already noted that inspite of service, the Respondents are not appearing in this Court. Respondent No.1 in whose favour the impugned order is passed has also failed to appear in this Court and contest the Writ Petition.

12. In view of the judgment on which learned counsel for the Petitioners has relied and for the same reasons the Writ Petition deserves to be allowed and Clause Nos. 2 and 3 of the impugned order are set aside.

13. It is clarified that execution proceedings to execute decree passed in R.C.S. No. 157 of 2012 by learned Civil Judge, Junior Division, Sangola by Judgment and Decree dated 28th June, 2013 may go on, however, actual possession of the parties shall not be disturbed till the disposal of the Appeal.

14. The learned District Judge-1 at Pandharpur is requested to dispose of Regular Civil Appeal No. 52 of 2017 expeditiously.

15. Writ Petition is allowed in the above terms.

(MADHAV J. JAMDAR, J.)