

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.3974 OF 2022

**ANIL DEVANAND JADHAV
VERSUS
RAJENDRA DEVANAND JADHAV AND OTHERS**

...

Advocate for Petitioners : Mr. Uday S. Malte
Advocate for Respondent No.4-C: Mr. A. A. Khande h/f Mr. Ajit
Manohar Gholap

...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 12th April, 2022

ORDER :

1. This petition filed under Articles 226 & 227 of the Constitution of India takes exception to the order dated 01/02/2022, passed by the learned District Judge-2, Kopergaon below Exhibit-5 in Regular Civil Appeal No.12/2021, thereby granting stay to the execution and operation of the judgment and decree dated 26/07/2021 passed in Regular Civil Suit No.96/2008 in favour of the petitioner.

2. The petitioner/original plaintiff filed Regular Civil Suit No.96/2008 for partition and separate possession of his share as described in the plaint. The petitioner also sought a declaration that

mutation in respect of the suit properties and liquor license are illegal and not binding on him. Rendition of accounts of liquor shop and share therein was also sought by the petitioner. After hearing the petitioner/plaintiff and respondent/defendants, by the judgment and decree dated 26/07/2021, the Trial Court partly decreed the suit. The petitioner is held entitled to partition and separate possession of his 1/6th share in the suit properties, so also 1/6th share in the annual profits of the liquor shop from the institution of the suit till the business continues. On 02/09/2021, the Trial Court forwarded the decree for initiating and completing necessary process as contemplated under Section 54 of the Civil Procedure Code, 1908 (for short "CPC"). The petitioner, thereafter, sought final decree by filing an Enquiry Application No.5/2021 under Order XX Rule 17 of CPC before the Trial Court.

3. The legal heirs of respondent no.4 preferred Regular Civil Appeal No.12/2021 challenging the judgment and decree along with an application under Order XLI Rule 5 of CPC seeking stay to the impugned judgment and decree. By the impugned order dated 01/02/2022, the Appellate Court has granted stay in favour of the respondents. Hence, the present petition.

4. Heard the learned Advocate for the petitioner and learned Advocate for respondent No.4-C.

5. The learned Advocate for the petitioner assailed the impugned judgment and decree contending that the Appellate Court has committed serious error in granting absolute stay to the judgment and decree passed by the Trial Court on merits. According to him, no case was made out by the respondents for grant of stay to the Trial Court's well reasoned judgment and decree. In support of his submissions, he relied on **Atma Ram Properties (P) Limited V/s Federal Motors Private Limited** reported in **2005 (1) SCC 705** and interim order passed by the Co-ordinate Bench of this Court in Second Appeal No.281/2016. According to him, the procedure to be followed is that after preliminary decree is passed, it has to be forwarded to the Collector. The said process takes considerable time, and since the decree is for partition and separate possession, the Appellate Court should not have granted stay.

6. Per contra, the learned Advocate for respondent No.4-C supported the impugned judgment of the Appellate Court contending that in the suit for partition and separate possession, the Trial Court has only defined the share of the petitioner and other's share is not

defined and/or declared. In that view of the matter, it is not possible to execute the judgment and decree passed by the Trial Court.

7. Record indicates that the Trial Court has passed a decree, thereby only declaring that the petitioner is entitled for 1/6th share in the suit properties. Admittedly, in the suit filed by the petitioner, there were five defendants who had share in the suit properties. In that view of the matter, unless and until the shares of all the persons who are entitled to the share in partition are defined, the decree passed in favour of the petitioner cannot be executed. In that view of the matter, the Appellate Court was right in granting stay to the impugned judgment and decree. The Appellate Court has held that the Trial Judge has only declared 1/6th share of the plaintiff in the suit properties and he has not declared shares of all the parties in the suit properties. The object underlying Rule 5 of Order XLI of CPC is to safeguard the interest of both the decree holder and judgment debtor. Thus, this rule strikes a just and reasonable balance between two opposing parties. The Appellate Court held that if the execution and operation of the impugned judgment and decree in respect partition of the suit properties and rendition of accounts of liquor shop is not stayed, it will be result in substantial loss to defendant Nos.4-A to 4-

D. The Appellate Court, therefore, granted stay to the impugned judgment and decree. This Court is of the considered view that no fault can be found in the impugned decision of the Appellate Court.

8. In Second Appeal No.281/2016, the Co-ordinate Bench of this Court, while admitting the second appeal, held that further steps in execution of the decree in respect of landed properties be allowed to be taken, except delivery of possession. It was held that since the impugned decree being preliminary decree, no further steps can be taken until final disposal of the appeal.

9. In the case in hand, since the preliminary decree is passed only to the extent of the petitioner by defining only his 1/6th share and since the shares of the other defendants/respondents are not defined, in the facts of the present case, it would not be possible to execute the preliminary decree. In that view of the matter, the Appellate Court was right in granting stay to the impugned judgment and decree.

10. In Atma Ram Properties (P) Limited (Supra), the Hon'ble Apex Court in facts of the case held that while exercising jurisdiction under Order 41 Rule 5 of CPC, the Appellate Court has to be alive to the fact that it is depriving the successful landlord of the fruits of the decree

and is postponing the execution of the order for eviction. There is every justification for the Appellate Court to put the tenant-appellant on terms and direct the appellant to compensate the landlord by payment of a reasonable amount which is not necessarily the same as contractual rate of rent. There can't be any dispute about the above principles. However, since in the peculiar facts of the present case, the preliminary decree passed in favour of the petitioner can not be executed, this citation does not help the petitioner's case in any manner.

11. For the aforesaid reasons, since no case is made out by the petitioner for exercising extra ordinary writ jurisdiction, the writ petition, being devoid of merits, is dismissed. No costs.

12. It is however made clear that since the suit is of the year 2008, the Appellate Court shall expedite the hearing of the appeal.

13. Needless to mention that the Appellate Court shall decide the appeal on its own merit, without being influenced by the observations of this Court in the present order.

[NITIN B. SURYAWANSHI, J.]

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