

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

WRIT PETITION NO.32 OF 2022

SANDU KHAN LAL KHAN PATHAN THROUGH HIS POWER OF
ATTORNEY HOLDER FARUKH SANDU KHAN PATHAN
VERSUS
VINAYAK SHAMRAO JADHAV

...

Advocate for Petitioners : Mr. Kale Vijay P. & Shendurnikar Pushkar S.
Advocate for Respondent/Sole: Mr. Deshmukh Vaibhav

...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 13th January, 2022

PER COURT :

. The petitioner is aggrieved by the judgment and order dated 30/10/2021, passed by the learned Joint Civil Judge, Senior Division, Aurangabad below application (Exhibit-5) in MARJI No.582/2021, thereby rejecting the application (Exhibit-5) filed by the petitioner.

2. The respondent/plaintiff instituted Regular Civil Suit No.1047/2003 in the Court of Vth Joint Civil Judge, Junior Division, Aurangabad, seeking possession of the house property from the petitioner/defendant. The suit was dismissed by the trial court by the judgment dated 22/09/2005. Being aggrieved by the said judgment, the respondent/plaintiff preferred Civil Appeal No.299/2005 before the IInd Ad-hoc Additional District Judge, Aurangabad. The said appeal came to be dismissed by the Appellate Court vide judgment and decree dated 06/07/2006.

3. Second Appeal No.219/2009 filed by the respondent/plaintiff was dismissed on 28/04/2009. Thus, the decree passed in Regular Civil Suit No.1047/2003 attained finality.

4. The respondent/plaintiff, thereafter, filed Special Civil Suit No.303/2015 in the Court of 6th Joint Civil Judge, Senior Division, Aurangabad, seeking possession of the house property from the petitioner/defendant. By an ex-parte judgment and decree dated 11/04/2019, the suit was partly decreed and the petitioner/defendant was directed to handover possession of the suit property within stipulated period. For execution of ex-parte decree, passed in Special Civil Suit No.303/2015, the respondent/plaintiff filed Special Darkhast No.32/2019 in the Court of Civil Judge, Junior Division, Aurangabad. In the execution, possession warrant was issued against the petitioner/defendant by the order dated 04/12/2019.

5. The petitioner/defendant filed MARJI No.582/2021 seeking stay to the execution proceedings, by raising various grounds. A delay condonation application is also filed along with the same. The stay is refused by the trial court by going into the merits of the petition of the petitioner filed under Order IX Rule XIII of the Civil Procedure Code (for short "CPC") for setting aside ex-parte decree.

6. Admittedly, ex-parte decree is passed against the petitioner, which the petitioner has challenged by filing application under Order IX Rule XIII of CPC. The said application and the delay condonation application need to be considered on its own merits by the trial court.

However, taking into consideration the fact that, possession warrant is issued against the petitioner, the trial court ought to have favorably considered stay application of the petitioner. The trial court has lost sight of the fact that by denying the stay, the proceedings filed by the petitioner under Order IX Rule XIII of CPC would be rendered infructuous. At the time of considering the stay application, the trial court was not justified in entering into the merits of the application filed by the petitioner under Order IX Rule XIII of CPC. While considering the stay application, the trial court ought to have taken into consideration whether prima facie case is made out by the petitioner, whether balance of convenience lies in favour of the petitioner and whether irreparable loss would be caused to the petitioner if the stay is refused. Since possession warrant is issued against the petitioner for execution of ex-parte decree, irreparable loss would be caused to the petitioner, if the execution proceedings are not stayed. The petitioner has made out a prima facie case and balance of convenience lies in favour of the petitioner.

7. In that view of the matter, the impugned order is unsustainable and the same is hereby quashed and set aside. The Writ Petition is allowed. The impugned order passed below Exhibit-5 in MARJI No.582/2021 is quashed and set aside. Application Exhibit-5 is allowed. Writ Petition is disposed of accordingly.

(NITIN B. SURYAWANSHI, J.)