

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

WRIT PETITION NO.5198 OF 2022

Mrs. Swati Sharad Chavan ..Petitioner
Versus
Mrs. Nayan Bharat Dawada ..Respondent

Mr. Prasad B. Kulkarni, for the Petitioner.
Mr. Akshay Petkar, for the Respondent.

CORAM : NITIN W. SAMBRE, J.

DATE : 11th JULY, 2022

P.C.

1. Impugned in the petition is an order dated 11th April, 2022 passed below Exh.5 by the Principal District Judge, Solapur in Civil Misc. Application No.96 of 2022.

2. The petitioner/tenant suffered a decree of eviction in the suit being Special Civil Suit No.31 of 2017.

3. It is the contention of the petitioner that since the decree was *ex-parte*, he has preferred proceedings under Order IX Rule 13 of the CPC for setting aside the same. In the execution proceedings being Special Darkhast No.9 of 2018, objection under Section 46 r/w Section 47 and Order XXI Rule 97 of the CPC was also lodged. It is claimed that since the aforesaid proceedings were taken out under misunderstanding of legal remedy, a

BGP.

fresh appeal under Section 96 of CPC was preferred questioning the aforesaid decree dated 17th January, 2018 in which the prayer of the petitioner for grant of stay vide Exh.5 came to be rejected vide order impugned dated 11th April, 2022. As such, this petition.

4. The contentions are, the petitioner is running commercial establishment viz. hotel business. It was under incorrect legal advice, the appeal under Section 96 of CPC was not filed. According to him, even if there was *ex-parte* decree, there are fair chances of the petitioner getting success in appeal and that being so, if the respondent/decreed holder is permitted to execute the decree, the petitioner will suffer irreparable loss.

5. The prayer is opposed by the counsel for the respondent/decreed holder, as according to him, the petitioner has already accepted the decree. According to him, the present attempt on the part of the petitioner is nothing less than prolonging the execution of the decree for possession.

6. I have appreciated the said submissions.

7. It appears that the petitioner has rightly chosen to question the aforesaid decree for eviction being *ex-parte* decree under Order IX Rule 13 of the CPC, which provides

an appropriate remedy. The said proceedings I am informed are already rejected/dismissed.

8. In addition to above, the petitioner has taken recourse to the objection under Order XXI Rule 97 r/w Sections 46 and 47 of the CPC in the pending execution proceedings, which I am informed is already rejected. In the said execution proceedings being Special Darkhast No.9 of 2018, the petitioner has accepted the decree in following words :-

“That, J.D. and D.H. hereby agrees with the Decree and judgement passed his the Hon’ble court in special civil suit 144/2017. The J.D. has paid to D.H. Rs.15,00,000/- towards, annual compensation, amenties charges and cost ordered by court through cheques drawn upon Axis Bank, Solapur bearing cheque No. 017253,017254 & 017255 respectively. The D.H. also confirms reciept of the aforesaid amount.

This Joint Pursis 21/03/2017”.

9. Once the petitioner has accepted the decree on 21st March, 2017 and thereafter acted on the same by depositing the amount, it is not open to the petitioner to seek relief contrary the said stand. Petitioner claimed to have entered into negotiation with the decree holder for purchase of the property which will hardly help the petitioner to establish strong *prima-facie* case in the

matter. Even if on merits, it is claimed by Mr. Prasad Kulkarni that the decree was passed *ex-parte* and petitioner is in long standing possession of the suit property, same will be hardly of any significance, in view of the fact that petitioner has got breathing period of more than five years in the matter of execution of decree in question.

10. The proceedings under Order IX Rule 13 of CPC are already informed to have been dismissed, as such petitioner cannot take recourse number of remedies for the same cause having already elected one of it.

11. In this view of the matter, in my opinion, the order impugned is quite justified. No case for consideration or grant of interim relief during pendency of the appeal is made out.

12. The petition as such fails, dismissed.

[NITIN W. SAMBRE, J.]