

R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 13097 OF 2022

Rafik Nurmahamad Patvegar & Ors.

.. Petitioners

Versus

Smita Anand MaNE & Ors.

.. Respondents

.....

- Mr. Harshvardhan Suryavanshi for Petitioners
- Mr. Sandeep Shripal Korgave for Respondents

.....

CORAM : MILIND N. JADHAV, J.

DATE : DECEMBER 05, 2022

P.C.:

1. By the present Writ Petition, the Petitioners have prayed for the following reliefs:-

“[A] That this Hon’ble Court be pleased to issue a writ of certiorari or writ in the nature of certiorari or any other appropriate writ direction and order under Article 226/227 of the Constitution of India, 1950, directing to quash and set aside the order dated 28.09.2022 passed by the Joint Civil Judge Senior Division, Kolhapur in Regular Darkhast No. 94 of 2017 at Exh. 73 and Exh. 91”.

2. The impugned order dated 28.09.2022 has been passed below Exh. 91 in Regular Darkhast No. 94 of 2017. The judgment-debtor i.e. predecessor of Respondents herein filed Application under Order XXI, Rule 29 of the Code of Civil Procedure, 1908 (for short "CPC") for stay to the execution proceedings till the decision in R.C.S. No. 704 of 2022 and for not passing any order on the Application under Exh. 73.

3. To appreciate the controversy between the parties, the following brief facts are necessary to be stated for deciding the present case:-

3.1. The Applicants (Respondents herein) filed Application in respect of the possession of the suit property which is mortgaged. Applicants filed R.C.S. No. 933 of 1973 for redemption of the mortgaged property. The said suit was decided on 18.07.1998. Applicants deposited the amount of Rs. 1,794.78 within six months as per the decree passed in R.C.S. No. 933 of 1973 vide C-No. 2766 on 15.01.1979. As per the preliminary decree, Applicant No. 2 – Ananda Bandu Mane deposited the said amount in the Court. Hence, as per the preliminary decree, possession ought to have been handed over to the Applicants alongwith documents of the mortgage. Hence, Applicants prayed that possession be handed over to Applicants from Petitioners (non applicants) as per schedule i.e. R.S.No. 1656 area 1003 sq mtrs. Situated at D Ward Tal. Karvir, District Kolhapur.

3.2. Accordingly by detailed judgment dated 30.03.2017, the Application in Final Decree No. 3 of 1979 came to be allowed after considering the evidence of both the parties. Petitioners who are the legal heirs of non-Applicants therein were directed to handover vacant possession of the suit house mentioned in the Application to the Respondents within a period of 60 days from the date of the said order

along with the mortgaged documents. That apart, Respondents were directed to execute a deed of re-conveyance in respect of the suit property; within a period of 60 days from the date of the said order. For the sake of convenience, the operative part of the Judgment dated 30.03.2017 in Final Decree No. 3 of 1979 is reproduced hereunder:-

- “(1) The Application is allowed.*
- (2) The Non applicants are hereby directed to handover the vacant possession of the suit house mentioned in the Application to Applicant No. 2 (A) to 2(D) within period of 60 days from the date of this order.*
- (3) The Non applicants are hereby directed to handover the mortgage documents to Applicant Nos. 2(A) to 2(D) within period of 60 days from the date of this order.*
- (4) The Non applicants are hereby directed to execute deed of re-conveyance in favour of Applicant Nos. 2(A) to 2(D) in respect of suit property within period of 60 days from the date of this order. If failed Court Commissioner appointed for transfer at the cost of Applicant Nos. 2(A) to 2(D).*
- (5) Final decree be prepared accordingly on payment of necessary court fees.*
- (6) Decree shall be drawn accordingly.”*

4. Record indicates that Respondents have filed Regular Darkhast No. 94 of 2017. This Regular Darkhast was filed in respect of Order and Judgment dated 30.03.2017 in Final Decree No. 3 of 1979. In the First Appeal preferred by the Petitioners against the above Judgment, the Appellate Court granted a conditional stay to the Judgment, *inter alia*, directing Petitioners to deposit Rs. 15,000/- per month as compensation and to furnish security of Rs. 2,00,000/- within one month. Petitioners did not comply with the conditional

order and the said order was subsequently vacated. Petitioners state that they had filed Second Appeal against the Order dated 29.09.2017 which is pending in this Court. Record indicates that Petitioners have not been able to obtain any order of stay in the said Second Appeal.

5. In the above background, Respondents filed Regular Darkhast No. 94 of 2017. Respondents entered into a re-conveyance deed through the Court and applied for seeking possession for the suit property.

6. At this stage in 2022, Petitioners filed a Suit for partition of the suit property along with Application under Order XXI, Rule 29 of CPC seeking an order from the Court not to pass any order in Regular Darkhast i.e. Execution Proceedings till the decision of R.C.S. 704 of 2022 i.e. the partition suit is made.

7. The learned Trial Court in paragraph Nos. 5 and 6 of its order dated 28.09.2022 has returned the following findings:-

5. Learned advocate for D.H. has filed his say to present application at (Exh. 94) and has strongly opposed the present application. It is contention of D.H. that contentions of present application are false. J.D. have appeared in present execution proceeding on 29.08.2017 and present application is filed after 5 years of their appearance. Preliminary decree in respect of redemption of mortgage was passed in R.C.S. NO. 933/1973 dated 18.07.1978. Appeal filed by J.D. against the said preliminary decree is dismissed. D.H. has paid Rs. 1,794.48 paise for redemption of mortgage as per the said preliminary decree. Thereafter, Final Decree No. 3/1979 is filed which came to be allowed on 30.03.2017. There is no stay to the said proceeding. Thereafter, the present execution petition is filed. Commissioner was appointed and re-conveyance deed as per register No. 4115/2022 dated 08.06.2022 was executed. Therefore, present application is not tenable.

6. *It is further say of D.H. is that provision of section 60 of Transfer of Property Act, 1882 (henceforth referred to as 'T.P. Act') is not applicable as decree of redemption of mortgage is already passed. They have not received any notice of R.C.S. NO. 704/2022. Hence, it is prayed that present application be rejected with cost of Rs. 10,000/-."*

8. Admittedly, R.C.S. NO. 704 of 2022 has been filed seeking partition in respect of the same property which was subject matter of R.C.S. NO. 157 of 1980 in which the said suit came to be decreed. The findings returned by the learned Trial Court in paragraph No. 7 attributing the delay on the part of Petitioners are admittedly found to be true in the facts and circumstances of the present case. Stay of execution proceedings under Order XXI, Rule 29 of CPC would frustrate the original decree which was passed in 1979. The decree holder as seen is at the receiving end for executing the decree.

9. No substantive case has been made out by the Petitioners.

10. In view of the above, Writ Petition is dismissed.

11. After the order is dictated, Mr. Suryavanshi, learned Advocate for Petitioners submitted that the Petitioners may be protected for a period of four weeks to enable them to approach the Supreme Court. In view thereof, this order shall be held in abeyance for a period of four weeks from the date on which it is uploaded.

[MILIND N. JADHAV, J.]

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by RAVINDRA
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AMBERKAR
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