

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 253 OF 2019

Sultansaheb Hasansaheb Patvegar

(Since Deceased) Through LR

A. Noormahammad Sulltanso Patvegar

(Since Deceased) Through LR

Rafiq Noormahammad Patvegar and others .. Petitioners

Versus

1. Aubai @ Akubai Gundu Jadhav

(Since Deceased) Through LR

2. Ananda Bandu Mane

(Since Deceased) Through LR

Smita Ananda Mane and others. .. Respondents

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- Mr. Harshvardhan B. Suryavanshi, for Petitioners.
- Mr. Sandeep Koregave, for Respondent Nos.2A to 2C.

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CORAM : MILIND N. JADHAV, J.

DATE : DECEMBER 05, 2022.

P.C.:

1. Heard Mr. Suryavanshi, learned Advocate for Petitioners and Mr. Koregave, learned Advocate for Respondent Nos. 2A to 2C.

2. By the Present Petition, Petitioner has prayed for the following relief:

“a) This Hon’ble Court be pleased to modify the Judgement and order passed by the District Court – 1, Kolhapur below exh. 5 dated 29-09-2017 only in respect of conditions imposed by the District Court -1, Kolhapur therein directing deposit of monthly compensation and security.”

3. The impugned order has been passed below Exh.5 by

District Judge- 1, Kolhapur in Regular Civil Appeal No.118 of 2017 filed by the Appellants for grant of stay to the execution and operation of judgment / order dated 30.03.2017 passed by the Learned Trial Court in Final decree No. 03/1979.

4. Such of the relevant facts as are necessary for deciding the present Petition are as follows:-

- i. Original Plaintiff No. 1 Aubai @ Akubai Gundu Jadhav and No. 2 Ananda Bandu Mane had filed Reg. Civil Suit No. 933/1973 for redemption of mortgage. The said suit came to be decreed on 18.07.1978 on condition to deposit Rs. 1794-48 within six months from the date of order and defendant No.1 Sultansaheb Hasensaheb Patvegar was directed to deliver possession of the suit property to the Plaintiffs.
- ii. Against the said decree, RCA No. 219/1978 was filed which came to be dismissed on dated 07.07.1983.
- iii. Thereafter Respondent No. 2 A to 2 D had filed Final Decree No. 3/1979 against the Appellants. It came to be allowed and the Learned Trial Court directed handing over vacant possession of the suit property to Respondent 2 A to 2 D within 60 days from the date of the order.
- iv. Being aggrieved by the said order, the Appellants

have preferred the present Appeal.

v. According to Appellants, deceased Gundu Jadhav had two wives Bayakka Gundu Jadhav and Aubai @ Akubai Gundu Jadhav. Bayakka had filed suit RCS No. 157/1980 for partition and cancellation of sale deed which came to be decreed on 17.04.1989. Against the said order, RCA No. 145/1989 was filed and it was dismissed. Thus, according to Appellants, Bayakka became owner of one half share in the suit property. That on 28.11.1983 she had sold her share by a registered sale deed to Rahimatbi Noormahamad Patvegar for Rs. 24,000/-. Since then Rahimatbi Noormahamad Patvegar was enjoying one half share in the suit property.

5. From perusal of record it is seen that the Learned Trial Court has passed the Final decree dated 30.03.2017 after considering the rival submissions and oral evidence led by the parties and concluded that Respondents were entitled to possession of the suit property. Respondents got the order in the final decree after a period of 39 years from the date of filing of the suit by their predecessors after a lengthy trial.

6. For considering whether the impugned decree is to be stayed, the Learned Trial Court has referred to the provisions of Order

XLI Rule 5 (3) of the Code of Civil Procedure, 1908. Order XLI Rule 5

(3) is relevant and reads thus:

“(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied.

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the Applicant for the due performance of such decree or order as may ultimately be binding upon him.”

7. Mr. Suryavanshi would submit that according to the Petitioners computation, Petitioners are in arrears of amount of Rs. 9,45,000/-. Hence, it was put to him whether the Petitioners would be willing to deposit the aforesaid amount in this Court or the Learned Trial Court for seeking stay of execution. After taking instructions from one of the Petitioners present in Court, Mr. Suryavanshi submitted that the Petitioners had a good case on merits which was not considered by the Learned Trial Court before coming to the conclusion that the Respondents are entitled to possession of the suit property. He submitted that Petitioners were not in a position to deposit any amount whatsoever to show their *bona fides*.

8. It is seen that the Appellate Court has jurisdiction to impose reasonable conditions and compensate the decree holder for any loss occasioned by the delay in execution of the decree, while

granting stay to the effect and operation of the impugned order. In the present case the judgment in Final decree has been passed in favour of the Respondent after a period of 39 years. Admittedly Petitioners are in use and occupation of the suit property and therefore under the statutory provisions they are bound to reasonably compensate for use and occupation of the suit property. Hence the conditions imposed by the Learned Appellate Court when read in reference to facts and circumstances of the present case, are found to be absolutely reasonable. I see no reason whatsoever to differ from the said conditions imposed by the Learned Appellate Court or substitute them for stay of the impugned Final decree. In spite of the impugned order having been passed on 29.09.2017 and the impugned decree specifying a time frame of one month for furnishing the security amount and deposit of Rs. 15,000 per month towards compensation, conduct of the Petitioners show that they have not honoured and are not inclined to honour the same even in the interregnum. Despite being asked to show their *bona fides* even today, Petitioners are not inclined to deposit the arrears amount.

9. In view of the above, the impugned order dated 29.09.2017 deserves to be sustained and does not call for any interference.

10. Writ Petition is dismissed.

11. At this stage, Mr. Suryavanshi submitted that Petitioners may be protected for a period of four weeks to enable them to approach the Supreme Court. This Order shall be held in abeyance for a period of four weeks from the date of its uploading on the website of the Bombay High Court.

[MILIND N. JADHAV, J.]

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RAVINDRA
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