

Arjun

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

**CIVIL APPLICATION NO.1490 OF 2015
IN
SECOND APPEAL NO.472 OF 2016**

**ARJUN
VITTHAL
KUDHEKAR**

Shri. Pravin Parshuram Rahate

...Appellant/
Applicant

V/s.

Smt. Pratibha Pandurang Rahate & Anr. ...Respondents

**WITH
CIVIL APPLICATION NO.276 OF 2020
IN
SECOND APPEAL NO.472 OF 2016**

Smt. Pratibha Pandurang Rahate

...Applicant

In the matter between

Shri. Pravin Parshuram Rahate

...Appellant

V/s.

Smt. Pratibha Pandurang Rahate & Anr. ...Respondents

Mr. Indrajeet R. Kulkarni, for the Appellant/Applicant.

Mr. Nikhil Wadikar a/w Faiza Shaikh, Pradip Zende,
Niranjan Kandade i/b Nandu Pawar, for Respondent
No.1.

**CORAM : MADHAV J. JAMDAR, J.
DATE : 6th DECEMBER, 2022**

P.C.:

1. Heard Mr. Indrajeet R. Kulkarni, learned counsel

appearing for the Appellant and Mr. Nikhil Wadikar i/b. Nandu Pawar, learned counsel appearing for Respondent No.1.

2. The Respondent No. 1 filed suit for recovery of possession and for mesne profits on 19th November, 2005 bearing Special Civil Suit No.523 of 2005. The said suit was dismissed by the learned Trial Court by the Judgment and decree dated 23rd August, 2011. The Respondent No. 1 i.e. Original Plaintiff filed Civil Appeal No.312 of 2012 and in the said Appeal the Appellate Court by the Judgment and decree dated 13th June, 2015 directed Appellant to handover the vacant possession of the suit shop to the Respondent No.1 and also directed to pay mesne profits at the rate of Rs. 6000 per month from the date of filing of the suit and interest at the rate of 6% p.a. payable from the date of said order until the actual realization thereof. The Second Appeal is filed questioning legality and validity of the said Judgment and decree passed by the learned Appellate Court.

3. By order dated 25th September, 2017 passed by this Court, the Second Appeal was admitted on the substantial question of law framed therein. Civil Application No.1490 of

2015 is filed seeking stay to the Judgment and decree of the learned Appellate Court. Civil Application No.276 of 2020 is filed by Respondent No.1 seeking the payment as per the decree passed by the learned Appellate Court.

4. Mr. Kulkarni, learned counsel appearing for the Appellant submitted that, this Court has framed the substantial question of law and accordingly, the Second Appeal is admitted and ad-interim relief of stay of the impugned judgment and decree was passed. He therefore, submitted that stay granted by this Court of the decree passed by the learned Appellate Court be confirmed.

5. On the other hand, Mr. Wadikar, learned counsel appearing for the Respondent No. 1 submitted that the decree passed by the learned Appellate Court is in two parts, one is directing to handover the possession and another is money decree as Appellant is directed to pay Rs. 6000/- per month from the date of filing of the suit and interest at the rate of 6% p. a. which will be payable from the date of that order. He further submitted that, he has no objection for stay to the execution of decree regarding possession of the suit shop, however, as far as monetary part of the decree is

concerned, he submitted that, the Applicant be directed to deposit the entire decretal amount. To substantiate these contentions, he relied on the Judgment of the Supreme Court in the matter between *M/s. Malwa Strips Pvt. Ltd. Vs. M/s. Jyoti Ltd.* passed in Civil Appeal No.7410-7411 of 2008. He submitted that possession decree be stayed subject to deposit of the decretal amount and further monthly payment.

6. He submitted that as per the contention of Respondent No.1 the suit shop is her exclusive property. However, even if, contention of the Appellant is accepted, then also the Appellant is entitled to only $1/3^{\text{rd}}$ share and Respondent No.1 has got atleast $1/3^{\text{rd}}$ share in the suit property and, therefore, appropriate directions be issued.

7. Perusal of record including written statement of the present Appellant i.e. Defendant No. 1 in the said suit shows that, Govind Rahate was having ancestral property. Said Govind Rahate had three sons namely Parshuram Govind Rahate, Pandurang Govind Rahate and Dattatray Govind Rahate. It is the contention of the Appellant-Pravin Parshuram Rahate that the suit shop has been purchased from the income received out of the joint family property or

the joint family business and, therefore, same belongs to the joint family of Parshuram, Pandurang and Dattatray.

8. It is further contention of the Appellant that husband of Respondent No.1 purchased suit shop in the name of Respondent No.1, however the same has been purchased from the income of joint family. It is the case of the Respondent No. 1- Pratibha Pandurang Rahate that she is the absolute owner of the suit shop.

9. Thus, if contention of the Appellant is accepted at the final hearing of this Second Appeal, then also it is clear that, the Appellant will have at the most only $1/3^{\text{rd}}$ share in the suit property. If at the final hearing of the Second Appeal, contention of the Respondent No.1 is accepted, then it will have to be held that she is the absolute owner of the suit property.

10. As the decree which is sought to be stayed by the learned Appellate Court is a decree for possession and money decree in the form of direction to pay mesne profit at Rs. 6000 per month from the date of filing of the suit and interest at 6% p. a. which will be payable from the said order and till the actual realization of the same.

11. Mr. Wadikar has relied on the said Judgment of the Supreme Court in the matter between *M/s. Malwa Strips Pvt. Ltd.* (supra) as well as he also placed reliance on the Judgment of the Supreme Court reported in (2005) 4 SCC 1 in the matter between *Sihor Nagar Palika Bureau Vs. Bhabhlubhai Virabhai & Co.* In the said decisions, it has been held that, ordinarily, execution of a money decree is not stayed inasmuch as satisfaction of money decree does not amount to irreparable injury and in the event of the appeal being allowed, the remedy of restitution is always available to the successful party. Still the power is there, of course, a discretionary power and is meant to be exercised in appropriate cases. In paragraph 12 of *M/s. Malwa Strips Pvt. Ltd.* (supra) it is held that an exceptional case has to be made out for stay of execution of a money decree. A strong case should be made out for passing an order of stay of execution of decree in its entirety. As observed hereinabove, even if the entire case of the Appellant is accepted then, also he will have only 1/3 share in the suit shop.

12. Admittedly the Appellant is in possession of the entire suit shop No. 6 admeasuring 201 sq. ft. situated at

Harekrishna Co-op. Housing Society Ltd., Thane (West). No exceptional circumstances are pointed out for stay of the entire money decree. Even if Appellant's case is accepted as it is then also she will have at the most 1/3 share in the said suit shop.

13. For the above reasons I pass the following order:-

ORDER

- i. Civil Application No. 1490 of 2015 is allowed in terms of prayer clause (a), subject to the Applicant depositing in this Court within a period of twelve weeks from today an amount of Rs. 4000 per month from the date of filing of the suit till December, 2022 and interest at the rate of 6% p.a. which will be payable from the date of the Appellate Court's order dated 13th June, 2015.
- ii. The Applicant to continue to deposit Rs.4000/- p.m. till disposal of the Second Appeal.
- iii. In case the Applicant fails to deposit said arrears in the stipulated period or commits default on 3 occasions in payment of Rs.4000/- p.m. then stay granted by this order shall stands vacated.
- iv. The Civil Application No.276 of 2020 filed by the

Respondent No. 1 also disposed of in view of the above order.

(MADHAV J. JAMDAR, J.)