

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 1315 OF 2020

- 1) Sau. Sangita Suresh Bhakte,
Aged about 58 years,
Occupation – Housewife,
- 2) Ku. Shraddha Suresh Bhakte,
Aged 24 years, Occupation – Student,
- 3) Ku. Chanchal Suresh Bhakte,
Aged 22 years, Occupation – Student,
- 4) Yash Suresh Bhakte,
Aged 19 years, Occupation – Student,
- 5) Jay Suresh Bhakte,
Aged 17 years, Off. Student, Minor
through guardian mother applicant 1,

All R/o Bhakte Plot, Gadge Nagar,
Amravati, Tahsil and District Amravati.

.... **PETITIONERS**

VERSUS

- 1) Arvind Damodhar Fiske,
Aged about 55 years,
Occupation – Pensioner,
R/o Behind Jawahar Navodaya
Vidyalaya, Navasari Road, Amravati,
Tahsil and District Amravati.
- 2) Suresh Narayanrao Bhakte,
Aged about 58 years, Occupation – Nil,
R/o Bhakte Plot, Gadge Nagar, Amravati,
Tahsil and District Amravati.

.... **RESPONDENTS**

Mr. S.D. Chande, Counsel for the petitioners,
Mr. S.J. Kadu, Counsel for respondent 1.

CORAM : ROHIT B. DEO, J.

DATE OF RESERVING THE JUDGMENT : 15-03-2022

DATE OF PRONOUNCEMENT OF THE JUDGMENT : 22-03-2022.

JUDGMENT :

The petitioners are assailing the orders dated 07-2-2020 rendered by the learned 9th Joint Civil Judge (Senior Division), Amravati in Regular Darkhast 42/2013 whereby the application preferred by the petitioners-objectors seeking stay of the execution proceedings, and the order dated 07-2-2020 whereby the application under Order XXI Rule 101 read with Section 151 of the Code are rejected.

2. Respondent 1-Arvind Damodhar Fiske instituted Regular Civil Suit 128/2012 seeking specific performance of contract. The defendant was Suresh Narayanrao Bhakte. The suit was decreed by the learned 4th Joint Civil Judge (Junior Division), Amravati on 14-2-2013. Respondent 1 initiated execution proceedings. Respondent 2-original defendant preferred appeal challenging the judgment and decree of specific performance which was accompanied by an application for condonation of delay, which was rejected by the appellate Court. The

defendant preferred Second Appeal 203/2019, which came to be dismissed by the High Court.

3. It is not in dispute that in view of the judgment and decree of specific performance, which has attained finality, the sale-deed of the suit property is executed in favour of respondent 1-decree holder by the Court Commissioner. The petitioners herein, however, preferred an application Exhibit 33 seeking permission to intervene in the execution proceedings and for stay to the execution. The said application dated 30-1-2017 avers that the petitioners have instituted separate suit against the decree-holder and the judgment-debtor seeking cancellation of the sale-deed executed in favour of the decree-holder by the Court Commissioner. On such premise, the petitioners sought relief which is noted supra.

4. The executing Court observed that the sale-deed is executed in favour of the decree-holder by the Court Commissioner. It is further noted that the subject property was bequeathed in favour of the judgment-debtor by his father, and was, therefore, his separate property. The prayer for stay of the execution was considered thus :

“9. Order XXI Rule 26 which speak that the court to which a decree has been sent for execution shall, upon, sufficient cause being shown, stay, the execution of such decree for a

reasonable time, to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such court of first instance or appellate court if execution had been issued thereby, or if application for had been made thereto.

10. From the plain reading of said provisions it is crystal clear that the said provision is enacted to enable the J.D. to apply in the court which the decree for reasonable time, to enable judgment debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree and execution thereof, for an order to stay execution or for any other order relating to execution of decree which might have been any such court first if execution had been issued, application for execution had been made thereto.

11. Here the case at hand, I have earlier observed that the order and decree passed by C.J.(J.D.) in R.C.S.No.128/2012 original defendant. It is to be noted that the present applicant is not J.D. or party defendant to the said original proceeding.

12. Further Order XXI Rule 29 of C.P.C. speaks about stay of execution pending suit between decree holder and judgment debtor. Here, the case at hand, it is undisputed fact there is no suit pending between D.H and J.D.

13. Thus, considering the reasons the present application is not maintainable in view of Order XXI Rule 26 and Rule 29 of C.P.C. Hence, the present application is devoid of merit and deserved to be rejected. Thus, in the result I pass following order.”

5. It appears that the petitioners also preferred application Exhibit 40 which is styled as an “application under Order XXI Rule 101 read with Section 151 of the Civil Procedure Code (Code)”. The averment in the said application is that the subject property is ancestral and that the

objectors have instituted separate civil suit Regular Civil Suit 29/2017 claiming such a declaration. In paragraph 8 of the said application Exhibit 40, the averment is that the separate suit which is instituted be treated as objection to the execution. Application Exhibit 40 is decided by the executing Court vide order dated 07-2-2020 and the relevant consideration reads thus :

“4. Read application. Perused record. I have gone through the provisions of Civil Manual. I have reproduced the same Chapter XIX, Clause 337-(i) under the head miscellaneous judicial proceeding are included all proceedings and inquiries of a judicial nature which do not form part of the proceeding in a suit or darkhast or appeal pending before the Court. ii) the expression included – proceeding under Order XXI, Rule 58, 97 and 99 of Civil Procedure Code.

5. Thus, in view of above mentioned provisions present application is not tenable in the execution proceeding. In the result, I pass the following order.”

6. The petitioners are also assailing, along with the order passed on application Exhibit 33 seeking stay of the execution, the order dated 07-2-2020 passed by the executing Court on application Exhibit 40 which purports to be an application under Order XXI Rule 101 read with Section 151 of the Code.

7. It would be relevant to note the prayer of the objectors in the application Exhibit 40, which reads thus :

“It is therefore prayed that, the R.C.S. No. 29/17, which is fixed for today 22.2.18 in the Hon’ble Court be called for and be made part and parcel of the execution case and be treated as memo of objection and be decided on merit and in the interest of justice.”

8. In my considered view, the executing Court did not commit any error in rejecting applications Exhibit 33 and 40. All that is done by the executing Court is to direct the objectors to institute appropriate proceedings. According to the objectors, the application which is not entertained, is preferred under a wrong provision and that the application ought to have been preferred under Order XXI Rule 97 of the Code. I need not delve deeper since the alleged rights of the objectors are not finally concluded. It is apparent that there is nothing decided on merits. The objectors are free to take recourse to such remedies as are available and permissible in law. In so far as as the present petition is concerned, I do not find any reason to interfere with the orders impugned.

9. The petition is dismissed.

JUDGE

Digitally signed by PRAFULLA
MANOHARRAO ADGOKAR
Signing Date: 22.03.2022 18:13

adgokar