

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.2980 OF 2023

**FATMABI RAHIMKHA PATHAN AND OTHERS
VERSUS
BHAIYYAKHA SARDARKHA PATHAN**

...

Advocate for Petitioners : Mr. Suvidh S. Kulkarni

Advocate for Respondent : Mr. L.v. Sangit

...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 23rd MARCH, 2023

PER COURT :

1. Petitioners are aggrieved by order dated 09/03/2022, passed by learned 3rd Joint Civil Judge, Junior Division, Chalisgaon, below Exhibit 1 and 14 in Regular Darkhast No.90/2022, thereby rejecting application filed by the petitioners/judgment debtors under Order 21 Rule 29 of the Code of Civil Procedure seeking stay to the execution proceeding.

2. Admitted facts on record are that, respondent/original plaintiff has filed Darkhast against petitioners/judgment debtors seeking execution of the judgment and decree dated 12/02/2016, passed by the trial Court in Regular Civil Suit No.31/1995, whereby relief of permanent injunction was granted in his favour. By judgment and decree dated 12/02/2016, petitioners/judgment debtors were restrained from disturbing respondent/decree holder's

possession over the suit field without following due course of law. The same is not challenged by the judgment debtors.

3. In the execution proceedings, judgment debtors filed application Exhibit-14, under Order 21 Rule 29 claiming that they have filed Special Civil Suit No.93/2022 against the decree holder for possession of the suit property and till the said suit is decided the execution proceeding may be stayed. Petitioners are aggrieved by the rejection of said application and direction given by the executing Court of granting police aid to the respondent/decreed holder, subject to the condition stated therein.

4. Heard learned advocate for petitioners and learned advocate for respondent. Perused the grounds raised in the writ petition, documents annexed thereto and the impugned order.

5. Learned advocate for petitioners has placed reliance on the provisions of Order 21 Rule 29 and 32 and in the decisions of the Hon'ble Apex Court in *Civil Appeal No.1382/2022 (Padhiyar Prahladji Chenaji (Deceased) Through LRs. Vs. Maniben Jagmalbhai (Deceased) Through LRs. and Others)* and *Civil Appeal No.6733/2022 (Balram Singh Vs. Kelo Devi)*, in support of his submissions.

6. It is a matter of record that while deciding the suit filed

by respondent, though prayer of specific performance and declaration was rejected, however, relief of permanent injunction is granted in his favour. Thereafter, execution proceeding is filed by the decree holder and in the said proceeding, judgment debtors filed application Exhibit-14 seeking stay to the execution proceeding.

7. While deciding the suit, trial Court has held that, defendants themselves admitted the permissive possession of the plaintiff and they have not entered the witness box on initial occasion to clarify as to how and when possession was handed over. There is no iota of evidence that this permissive possession was revoked or withdrawn at any point of time. Trial Court, therefore, considering the evidence on record and the said admission, has recorded that on the basis of preponderance of probabilities, the plaintiff has proved his factual possession over the suit field. By relying on the ratio in *Mumbai International Airport Pvt. Ltd. Vs. Indamer Company Pvt. Ltd. and Another, 2008 (2) BCJ 571*, trial Court has held that "*though a person found in wrongful possession of the property, even the true owner cannot disposses him without following due course of law*". By relying on ratio in *Chandrashekhar Shankarrao Kulkarni Vs. Rahul Shikshan Prasarak Mandal, 2006 BHCCO 1635*, it is held that "*when a person seeking perpetual*

injunction proves his possession on the date of suit referable to some lawful right, decree for perpetual injunction can be granted".

Trial Court, therefore, granted injunction in favour of the plaintiff.

8. Considering these aspects and the fact that decree holder has sown wheat crops which he wanted to harvest, the executing Court has passed the impugned order, which in my opinion cannot be faulted with.

9. In ***Balram Singh*** (supra), plaintiff had filed a suit simplicitor for permanent injunction only, having conscious of the fact that he might not succeed in getting relief of specific performance of unregistered agreement to sale. In these facts, it was held that "*plaintiff cannot get the relief indirectly which otherwise he/she cannot get in a suit for substantive relief*". It is, therefore, held that "*the plaintiff cannot get the relief even for permanent injunction on the basis of such unregistered document/ agreement to sale, more particularly when the defendant specifically filed the counter-claim for getting back the possession which was allowed by the learned trial Court*". This citation is distinctable on the facts.

10. In ***Padhiyar Prahladji Chenaji*** (supra), in paragraph No.9, in the facts of that case, it is held that "*defendant No.1 is held to be the true and absolute owner of the property in question,*

pursuant to the execution of the sale deed dated 17/06/1975 in his favour, the true owner cannot be restrained by way of an injunction against him". It is, therefore, held that "in a given case, the plaintiff may succeed in getting the injunction even by filing a simple suit for permanent injunction in a case where there is a cloud on the title. However, once the dispute with respect to title is settled and it is held against the plaintiff, in that case, the suit by the plaintiff for permanent injunction shall not be maintainable against the true owner".

11. In the case in hand, there is no illegality or perversity in the order impugned in present petition. The executing Court has passed a reasoned order, which is in consonance with the ratio in ***Chandrashekhar Shankarrao Kulkarni*** (supra). No case is made out by the petitioners to exercise extraordinary writ jurisdiction. Writ petition being devoid of merit is dismissed.

(NITIN B. SURYAWANSHI, J.)