

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

WRIT PETITION NO. 9456 OF 2021

SANTOSHKUMAR DWARKAPRASAD PANDIT AND OTHERS
VERSUS
LATABAI JAGDISHPRASAD VYAS AND OTHERS

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Advocate for Petitioners : Mr. Kedar Balbhim R.
Advocate for Respondent nos. 1 to 4, 7 and 11 : Mr. Dighe Vithal H.

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CORAM : SHAILESH P. BRAHME, J.
DATE : 29th NOVEMBER 2023.

Per Court :

. Heard the learned Counsel for petitioners and the learned Counsel for the respondents.

1. It is informed that the respondent nos. 5 to 5(e) are still unserved. The respondent nos. 5 to 5(e) have neither contested, nor supported application (Exhibit-5) under Order 41 Rule 5 of the Civil Procedure Code. They have not shown any interest so far. Their interest is to the extent of the share allotted by the decree passed by the trial Court. However considering the urgency in the matter, I deem it proper to decide the matter finally. I am of the considered view, no prejudice would be caused even if the matter is decided in their absence.

2. The petitioners have taken exception to the order dated 09.07.2021 below Exhibit-5 passed by the learned District Judge – I,

Ambad in RCA No.202/2021, allowing an application under Order 41 Rule 5 of CPC by imposing condition of depositing mesne profit of Rs.25000/- from the year 2013. The petitioners are original defendant nos. 5, 6 and 8. The respondent no.1 is the plaintiff. She had filed RCS No.25/2013 for partition and possession. It was decreed partly by the judgment and decree dated 25.02.2020. Being aggrieved, the petitioners have preferred RCA No.202/2021 alongwith application (Exhibit-5) under Order 41 Rule 5 of CPC.

3. The learned Counsel for the petitioners submits that the relief of mesne profit has not been granted by the trial Court. An specific issue was framed which was answered in negative. No appeal or cross objection has been preferred by the respondent no.1 against the finding on the issue of mesne profit. He submits that granting anything towards mesne profit is without jurisdiction. He further raises objection for awarding the amount from 2013 that is year of institution of the suit. He would submit that condition imposed is perverse and liable to be quashed.

4. The learned Counsel for the respondent no.1 supports impugned order. He would point out that the petitioners are in possession of the suit land. As per the decree passed by the trial Court, the respondent no.1 and other defendants are entitled to the share in the suit land which is in possession of the petitioners. The petitioners are enjoying possession and therefore they are liable to comply with the condition. It

is further pointed out that the execution of the decree has been stayed and the respondent no.1 has not received anything so far.

5. I have considered the rival submissions of the parties. The application at Exhibit-5 is allowed by imposing condition. The Appellate Court has jurisdiction to impose condition as per Order 41 Rule 5 of CPC. The respondent no.1 had prayed for relief of partition, possession and mesne profit. An issue no. 6 was cast and it was answered in negative. The finding recorded for issue no.6 has not been challenged by the respondent no.1. In this scenario, it would not be permissible to grant anything towards mesne profit at the interlocutory stage. The condition of depositing Rs.25000/- towards mesne profit is unsustainable.

7. However, at the same time, it cannot be loss sight of that the subject matter is gut no.178 measuring 14H 11R which is in possession of the petitioners. They are holding the land as co-partner, in view of the decree passed against them. They cannot be said to be exclusive owner to enjoy the fruits of the suit land. The respondent no.1 as well as defendants in the suit are entitled to share in the suit land. The respondent no.1 and other defendants are deprived of the enjoyment of the suit land. It is no body's case that the petitioners who are culminating the suit land, are sharing profits of the suit land with the respondents after 2010.

8. In that view of the matter, I propose to modify the condition

imposed by the Lower Appellate Court by the impugned order. The ends of the justice would be met if the petitioners are directed to deposit the amount of Rs.2,00,000/- (Rupees Two Lakh) before the Lower Appellate Court towards security and the Lower Appellate Court is requested to dispose of appeal. The observations of this Court are prima facie in nature. I, therefore, pass the following order.

ORDER

(i) The order dated 09.07.2021 passed by the learned District Judge – I, Ambad below Exhibit-5 in RCA No.202/2021 is quashed and set aside and substituted by following order :

(a) The execution of the judgment and decree dated 25.02.2020 passed in RCS No.25/2013 shall stand stayed on depositing Rs.2,00,000/- (Rupees Two Lakh) by the petitioners in the Lower Appellate Court within a period of six weeks from today.

(b) The learned District Judge-I, Ambad is requested to dispose of RCA No.202/2021 within a period of eight months from today.

(ii) The writ petition is disposed of in the above terms.

[SHAILESH P BRAHME, J.]