

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

WRIT PETITION NO. 14220 OF 2023

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|--------|--------------------------------|----------------|
| 1. | Popat Suryabhan Aher | |
| 2. | Anusayabai wd/o Suryabhan Aher | |
| 3. | Sarlabai w/o Sahebrao Jadhav | ...Petitioners |
| Versus | | |
| 1. | Ashabai w/o Rangnath Barde | |
| 2. | Mandyabai w/o Suryabhan Aher | |
| 3. | Ashabai w/o Rangnath Barde | ...Respondents |

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Advocate for Petitioners : Mr. Shinde Abasaheb D.

Advocate for Respondents : Adv. A. Ansari

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CORAM : SHAILESH P. BRAHME, J.

DATE : 8th NOVEMBER 2023

PER COURT :

. Heard the learned Counsel for the litigating sides.

1. The petitioners are challenging orders dated 04.09.2023 passed below Exhibit 54 and 56 in Regular Darkhast No.79/2014. The petitioners are the judgment debtors and the respondents are decree holders in execution arising out of Regular Civil Suit No.86/2005. The parties are related interse. The parties are at the loggerhead on the issue of heir-ship from Suryabhan Aher.

2. Petitioner No.1 is son; petitioner no.2 is widow and petitioner no.3 is daughter of Suryabhan. The respondent no.2/Mandabai who is

another widow of Suryabhan. It is necessary to refer to certain litigation amongst the parties.

3. Regular Civil Suit No.456/1998 was filed by the petitioners for partition and separate possession against the respondents. It was dismissed on 18.12.2002. Thereafter the respondents instituted Regular Civil Suit No.86/2005 for injunction and declaration against the petitioners. It was decreed on 05.03.2008. The decree was challenged by the petitioners unsuccessfully before the higher forum. Regular Civil Suit No.39/2013 has been filed by the petitioner no.3-Sarlabai for declaration, injunction against the respondents. The suit is still pending before the Civil Judge, Junior Division, Kopargaon.

4. As the respondents were armed with decree passed in RCS No.86/2005 and petitioners committed breach of injunction, they were required to file Regular Darkhast No.79/2014. In the execution, application (Exhibit-54) was filed by the respondents seeking police aid for the execution of the decree and removing encroachment. Another application at Exhibit-56 is preferred by the petitioner no.3 – Sarlabai seeking stay to the execution proceeding. Both the applications are decided by separate order passed on 04.09.2023, application Exhibit-54 is allowed whereas application Exhibit-56 is rejected.

5. The learned Counsel for the petitioners submits that in view of Order 21 Rule 29 of the Civil Procedure Code, the execution preferred by the respondents needs to be stayed as substantiate suit is filed by the

petitioner no.3 – Sarlabai. He further submits that the suit of Sarlabai is on the verge of conclusion and can be disposed of within a period of a month or two. He further submits that the petitioners are having their residence in the suit land.

6. The learned Counsel for the petitioners submits that the respondents are pressing hard for removing the construction of the petitioners and dispossessing them from the suit land. It is further submitted that the learned executing Court is also not prepared to accommodate the petitioners. He has placed on record the judgment passed in RCS No.456/1998 to show that petitioner no.3 was not party.

7. Per-contra, the learned Counsel for the respondents supports the impugned orders. She has vehemently submitted that her client who are decree holder is required to execute the decree because of the mischief of the petitioners. The petitioners encroached on the suit land and made Kachcha construction. The submissions of the petitioners that they have houses in the suit land, are vehemently opposed. She further submits that the suit filed by the petitioner no.3 is a proxy suit and palpably filed with oblique motive to deprive the respondents from the fruits of decree. It is further submitted that the petitioner no.3 was knowing the earlier litigation despite it is being represented in her suit that the decree passed in RCS No.456/1998 is not binding.

8. The learned Counsel for the respondents further submits that

already while RCS No. 456/1998, it is recorded by the trial Judge that there was a partition. The suit was dismissed. Therefore the present suit preferred by the petitioner no.1, is not maintainable. Learned Counsel for the respondents has drawn my attention to the findings recorded by the trial Court in RCS No.86/2005 especially in paragraph no.15 which shows that the respondents were residing in the suit premises after the death of Suryabhan. The findings recorded in paragraph no.15 falsifies submission of the petitioners. It is therefore prayed that there is no merit in the petition and it is liable to be dismissed.

9. The petitioner no.3 has filed RCS No.39/2013 which is still pending. It is filed against the other petitioners and respondents. In earlier suit that is RCS No.456/1998 which was filed by the petitioner no.1 and 2, petitioner no.3 was not a party. Her contention in the RCS No.39/2013 is that earlier decree of dismissal of the suit is not binding upon her.

10. The learned Counsel for the petitioners has pressed into service the provision of Order 21 Rule 29 of CPC. In view of the statutory provision, it can be said that as the RCS No.39/2013 filed by the petitioner no.3, is pending before the competent Court, execution of the decree which is in favour of the respondents cannot be proceeded further. I am of the considered view that in view of the statutory provision, the execution of the decree passed in RCS No.86/2005 needs to be stayed on certain condition.

11. Both the learned Counsels have taken me through the factual aspects of the matter. The petitioners have vehemently contended that they are residing in the suit premises. As against that, respondents' contention is that they have encroached on the suit premises and there is no permanent construction in the suit premises. However, in view of the mandatory statutory provision stated above, I need not embark an enquiry into the possession of the party in the suit premises.

12. Both the learned Counsels have taken me through the findings recorded by the trial Court in the RCS No.86/2005 as well as RCS No.456/1998. However for appreciating the present controversy, I need not to deal the rival submissions advanced by the learned Counsel on the factual aspects of the matter.

13. It is informed that RCS No.39/2013 initiated by the petitioner no.3 – Sarlabai is at advanced stage. It is expected that the petitioners shall cooperate the trial Court in that matter for its conclusion. I propose to expedite the said suit. It is apparent that the respondents are armed with the decree since 2008, which has been confirmed in the Appellate forum. The prompt execution of the decree can be said to be legitimate expectation of the respondents.

14. In view of above discussion, I propose to pass following order.

ORDER

(i) The orders dated 04.09.2023 below Exhibit 54 and 56 in Regular

Darkhast No.79/2014 passed by the Civil Judge, Senior Division, Kopargaon, are quashed and set aside.

(ii) There shall be stay to the further proceeding of Regular Darkhast No.79/2014, which is pending before the Civil Judge, Senior Division, Kopargaon till the final adjudication of RCS No.39/2013 pending before the Civil Judge, Junior Division, Kopargaon

(iii) The proceeding of RCS No.39/2013 pending before the Civil Judge, Junior Division, Kopargaon, shall be finally decided within a period of two months from today.

(iv) It is made clear that the stay granted today, shall operate till final decision of the RCS No.39/2013 only.

(v) The respondents are at liberty to avail appropriate remedy in case the petitioners commit any breach/defiance of the order passed today or in any way protract RCS No.39/2013.

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

[SHAILESH P. BRAHME, J.]

Najeeb.