

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5962 OF 2023

Bhivaji Shamrao Gavli

...Petitioner.

Versus

Shivaji Kerba Gavli & Ors.

...Respondents.

Mr. Yuvraj Narvankar for the petitioner.

Mr. Rugwed Kinkar and Dheeraj Patil i/b Drupad S. Patil for the respondents.

Coram : Sharmila U. Deshmukh, J.

Date : August 4, 2023.

P. C. :

1. Heard.
2. The challenge in the petition is to the order dated 15th April 2023 granting police aid to the decree holder for execution of the possession warrant and the order dated 18th April 2023 rejecting the petitioner's application seeking stay to the execution till the decision in appeal.
3. Learned counsel appearing for the petitioner submits that as against the judgment and decree dated 22nd July 2019, an appeal is preferred before the District Court, being Regular Civil Appeal No. 36 of 2022. He would further submit that as the appeal was beyond the

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prescribed period of limitation, an application for condonation of delay was filed as well as the stay to the decree was sought. He would further contend that as the same was pending adjudication, an application was preferred before the executing Court seeking condonation of delay in filing the application for stay.

4. *Per contra*, learned counsel for the respondent submits that no orders were passed in the appellate proceedings and, as such, the executing court has directed to provide the police aid to execute the possession warrant.

5. Considered the submissions.

6. The judgment and decree dated 22nd July 2019 directs the petitioner to hand over the possession of suit property. It is not disputed that the property in question is the residential house of petitioner. The *factum* of filing of appeal is also not disputed. In Regular Darkhast No.10 of 2022, an application came to be moved seeking the stay of judgment till the condonation application and stay application is heard by the appellate court.

7. The executing court has rejected the application on the ground that the appellate court was not approached within time and

that the applicant will not sustain substantial loss. It also observed that the possession warrant was issued despite objection by the petitioner and there is delay to approach the executing court also.

8. Considering that the appeal was pending before the appellate court in which the application for condonation of delay as well as stay application was under consideration of the appellate court, the trial court could have deferred the hearing of execution application. It ought to be noted that if the possession warrant is executed, the appeal will be rendered infructuous. Considering that the decree is in respect of the possession of residential house, a lenient view ought to have been taken.

9. In view of the above, the impugned orders dated 15th April 2023 and 18th April 2023 are hereby quashed and set aside. As a result of order dated 15th April 2023 being quashed, the applications filed below Exhibit-16 and Exhibit-20 stand allowed.

10. Writ petition stands disposed of.

[Sharmila U. Deshmukh, J.]