



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

931 WRIT PETITION NO. 6386 OF 2024

KISAN NANASAHEB KHATANE AND ANOTHER
VERSUS
BALASAHEB MARTAND KHATANE AND ANOTHER

Mr. N. D. Sonavane, Advocate for the petitioners

CORAM : R. M. JOSHI, J.

DATE : 27th FEBRUARY, 2025

PER COURT :-

1. None present for the respondents though served. This indicate that their disinclination to oppose the petition.
2. This petition takes exception to order passed below Exhibit 5 in R.C.S. No. 3/2024 filed by the petitioners/ appellants/original defendants.
3. Petitioners are defendants in R.C.S. No. 222/2024. This suit came to be decreed by judgment and decree dated 06/11/2023, wherein the defendant Nos.1 and 2 are restrained from causing any obstruction to use of way mentioned in prayer clause 'A' of the suit. Further injunction was granted against defendant No.2 restraining him from causing any damage to the common bandh of the suit property and land of defendant No.2. Defendants being aggrieved by the said judgment and decree filed R.C.A. No. 3/2024. An application was filed vide Exhibit

5 seeking stay to the judgment and decree dated 06/11/2023. This application came to be dismissed, hence this petition.

4. Learned counsel for the petitioners submits that the First Appellate Court has rejected the application not on merit but with observation that there is no execution proceeding filed by the decree holder. It is his submission that merely because execution proceeding is not filed, there is no justification not to entertain the application filed by the petitioners.

5. No doubt it is a discretion of the First Appellate Court after considering the merit of the case whether or not to grant stay to the impugned judgment and decree. However, the Court cannot refuse the entertainment of the application solely on the ground that no execution proceeding is filed. Even in absence of execution of decree sought by the plaintiff, defendant/appellant can make out case of stay thereof. Perusal of the impugned order shows that the said dismissal is not passed on considering merit of the case. Such order therefore cannot sustain.

6. Hence, petition is allowed. Impugned order is set aside. Exhibit 5 is relegated back to the First Appellate Court for decision afresh in accordance with law.

(R. M. JOSHI, J.)

ssp