

MHBU040010172023



Order Below Exh.5
(Passed on 12.12.2023)

This is an application filed by the appellant/original defendant No.1, seeking stay order to the execution of Judgment and decree dated 8.9.2023 passed in Reg.Civil Suit No.84/2015 by the Joint Civil Judge Senior Division, Khamgaon.

2. The application has been resisted by respondent No.1/original plaintiff by filing say at Exh.14. It is contended that application is not maintainable as per Order 41, Rule 5 of the Civil Procedure Code. It is contended that after 08 years respondent No.1/original plaintiff has got decree in his favour and he is entitled to enjoy the fruits of Judgment and decree. It is contended that the registration of appellant Trust is already canceled by the competent authority in the year 2017. It is contended that alleged sale deed in favour of appellant/original defendant No.1 is declared as null and void by the trial court. Hence, the appellant is not entitled for stay order. It is submitted that respondent No.1 is in possession of suit property and if stay order is granted then he will be forcibly dispossessed by the appellant. Hence, he requested to reject the application.

3. Mr. M.B.Phirke, advocate for the appellant has submitted that appellant has purchased the suit property from the respondent No.2/original defendant No.2 by registered sale deed in the year 2015 and since then he is in possession. He submitted that the appellant has prima facie case and every hope of success in the appeal. Because trial court as well as Appellate Court had held the possession of appellant while deciding the temporary injunction application. He submitted that in such circumstances, if the stay order is not granted then the purpose of filing the appeal will be frustrated and respondent No.1 will dispossessed the appellant . Hence, he urged to grant the stay order.

4. On the other hand, Mr. S.T.Joshi, advocate for respondent No.1/original plaintiff has submitted that the trial court considering prima facie case has rejected the temporary injunction application of the plaintiff. He submitted that on merits after considering the evidence adduced by both the parties, the trial court has decreed the suit of the plaintiff holding the possession of plaintiff over suit property and declared that the sale deed in favour of appellant/original defendant No.1 is null and void. He submitted that in such circumstances, if stay order is granted then the appellant will dispossessed the plaintiff from the suit property. Hence, he urged to reject the application.

He relied upon the case **M/s. Atmaram Property Pvt.Ltd. V/s. M/s. Federal Motors Pvt.Ltd.**, Appeal (Civil) 7988 of 2004 dated 10.12.2004, in which the Hon'ble Supreme Court held that while

passing an order of stay under Rule 5 of Order 41 of the Code of Civil Procedure, 1908, the Appellate Court does have jurisdiction to put the applicant on such reasonable terms as would, in its opinion reasonably compensate the decree holder for loss occasioned by delay in execution of decree by the grant of stay order, in the event of the appeal being dismissed, and in so far as those proceedings are concerned. Such terms, needless to say shall be reasonable.

5. I have considered the submissions of both sides. Perused the application, say, impugned judgment of trial court and record and proceeding.

6. The record shows that the respondent No.1/original plaintiff had filed RCS No.84/2015 for declaration, permanent injunction and setting aside sale deed dated 26.5.2015. The trial court after considering the evidence of both parties and hearing them, decreed the suit with costs. It is declared that plaintiff is owner and is in possession of the suit property. It is declared that sale deed dated 1.6.2015 executed by defendant No.2 in favour of defendant No.1 is illegal and unlawful and not creating any right, title or interest in favour of defendant No.1. The defendant No.1 its member, agent, servants or anybody claiming through them are permanently restrained from disturbing the peaceful possession of the plaintiff over the suit property. The record shows that the trial court while deciding the temporary injunction application and the Appellate Court while

deciding Misc.Civil Appeal No.26/2017 have held that the appellant/defendant No.1 has been in possession of the suit property. This Court being first Appellate Court is last fact finding Court. Therefore, it is necessary to re-appreciate the evidence adduced by both the parties while deciding the main appeal because the trial court has declared that the sale deed in favour of appellant/original defendant No.1 is null and void. In such circumstances, if the impugned judgment and decree is not stayed then the purpose of filing the appeal will be frustrated. Therefore, it is necessary to stay the execution of impugned judgment and decree. Moreover, it will take more time to decide the appeal. In such circumstances, if stay order is not granted then the appellant/defendant No.1 will be dispossessed from suit property and the purpose of filing the appeal will be frustrated. Hence, it is necessary to stay the execution and operation of impugned Judgment and decree on certain terms and condition. I have respect to the observation of the Hon'ble Supreme Court in the case cited supra by the respondent No.1. But it is not helpful to the respondent No.1 because the cited case was rent case and present suit is for declaration, permanent injunction and cancellation of the sale deed. Therefore, in the light of above reason and discussion, the application deserves to be allowed. In result I pass the following order :-

ORDER

1] Application Exh.5 is hereby allowed.

- 2] The effect and operation to the execution of Judgment and decree dated 8.9.2023 passed in Reg.Civil Suit No.84/2015 by the Joint Civil Judge Senior Division, Khamgaon is hereby stayed till decision of main appeal or till six months from this order, whichever is sooner on following conditions :-
- [i] Appellant/original defendant No.1 shall deposit the cost of decree in this Court within two weeks from this order.
- [ii] On failure to compliance of this order by appellant, the stay order automatically stands vacated.
- 3] Inform the order to the trial/executing court accordingly.

Dt.12/12/2023

Sd/-
(G.B.Jadhav)
District Judge-1, Khamgaon,
Dsit.Buldhana.

Certificate

I affirm that the contents of this P.D.F. file order are same word for word as per original order.

Name of Steno : Mrs.Nishat Anjum Mohd.Rafique.

Name of Court : District Judge – 1, Khamgaon, Dist. Buldana.