

**ORDER BELOW EXHIBIT 40 IN**  
**REGULAR CIVIL APPEAL NO. 95/2018**  
**(VASANT VS. SHASHIKANT & OTHS.)**  
**(PASSED ON 03/12/2021)**

**Nature of the Application**

1. This is an application filed by the appellant (for short 'defendant No. 1') to stay the Judgment and decree dated 05/03/2018 (for short 'decree') passed by the Civil Judge, Junior Division, Mangalwedha (for short ' Civil Judge') in the Regular Civil Suit No. 2/2013 (for short 'suit').

**Contents in the Application**

2. The defendant No. 1 has contended that the respondent No. 1 (for short 'plaintiff') filed suit seeking partition and separate possession. The suit is decreed.

3. The Civil Judge has not considered the facts and evidence on record and arrived at wrong conclusion and has decreed the suit. The plaintiff is in hurry to get execute the decree.

4. The decree and the findings given by the Civil Judge in the suit, are prima-facie illegal. The plaintiff will try to execute the decree. If the plaintiff is allowed to do this, it will cause irreparable loss to the defendant No. 1 which cannot be compensated in terms of money. The defendant No. 1 has every chance to succeed in this appeal. Therefore, in the interest of justice it is necessary to stay the decree.

5. On these grounds the defendant No. 1 has prayed to grant the application.

**Contents in the Say of the Plaintiff.**

6. The plaintiff has filed say and has strongly objected the application.

7. The plaintiff has contended that the application is not legal

and tenable. The suit is decided after 22 years. Now, the defendant No. 1 is abusing process of law. The plaintiff has succeeded in proving that he is entitled to partition. This fact is clear from the findings of the Civil Judge. The application is filed to delay the hearing. There is no sufficient reason to grant the application.

8. On these grounds the plaintiff has prayed to reject the application.

### **The Argument**

9. I have heard Shri. B. A. Bahirat, advocate for the defendant No. 1 and Shri. K. M. Ghadage, advocate for the plaintiff, at length.

10. They argued in consonance with their contention in their application and say. In order to avoid repetition, I will deal with those at the time of discussing the points taken for consideration.

### **Legal Position Under Order XLI Rule 5 of the Code of Civil Procedure.**

11. Before proceeding to discuss merits of the application, for better appreciation, let me reproduce the relevant statutory provision under Order XLI Rule 5 (1 and 3) of the Code of Civil Procedure (for short C.P.C.).

12. Order XLI Rule 5 (1 and 3) of the C.P.C. reads as follows :-

(1) Stay by Appellate Court – (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

Explanation – An order by the Appellate Court for the stay of execution of the decree shall be effective from the date of the communication of such order to the Court of first instance, but an affidavit sworn by the appellant, based on his personal knowledge, stating

that an order for the stay of execution of the decree has been made by the Appellate Court shall, pending the receipt from the Appellate Court of the order for the stay of execution or any order to the contrary, be acted upon by the Court of first instance.

- (2) X X X X X X X X X
- (3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied -
- (a) that substantial loss may result to the party applying for stay of execution unless the order is made;
- (b) that the application has been made without unreasonable delay; and
- (c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.
- (4) Subject to the provisions of sub-rule (3), the Court may make an ex parte order for stay of execution pending the hearing of the application.
- (5) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of Rule 1, the Court shall not make an order staying the execution of the decree.

### **Points and Findings**

13. Upon hearing the following points arise for my consideration and I record my findings thereon as under for the reasons to follow :-

	<b>Points</b>	<b>Findings</b>
1)	Whether there is sufficient cause to stay the execution of the decree in the suit, as prayed for ?	Yes.
2)	What order ?	Application granted, As per final order.

**Reasons as to Point No. 1**

14. The defendant No. 1 has contended that the plaintiff is intending to execute the decree which will cause irreparable loss to him.

15. It transpires from the decree passed by the Civil Judge that the plaintiff has succeeded in proving that the suit-lands are the undivided joint property and he is entitled for partition in the suit-lands, prima-facie. This finding is based on the oral and documentary evidence led by the parties.

16. After going through the pleadings of both parties and the evidence led by them, it is prima-facie clear that the plaintiff and the defendant No. 1 are having arguable points in their favour.

17. The defendant No. 1 has challenged the decree passed in the suit, in this appeal. The decree in the suit is required to be re-judged and pending such adjudication if it is executed, in the event of his ultimate success, the suffering of the defendant No. 1 may become irreversible. Therefore, the application deserves to be granted, at this stage.

18. Moreover, whether the decree under appeal is proper or legal or not is required to be considered on merits at the time of final hearing of this appeal.

19. After carefully considering all the relevant aspects, it is clear that the decree is in respect of partition of the suit-lands and in my opinion, this is sufficient reason to grant this application and there are no exceptional reasons existing which requires the rejection of the same, at this stage.

20. After going through the decree under appeal it transpires, that the decree is to be executed by effecting partition. In my opinion, if

decree for partition is allowed to remain as it is, the legal rights of the defendant No. 1 will be prejudiced and he will suffer substantial loss. Under these facts and circumstances the court's interference is necessary to protect the defendant No. 1's legal rights.

21. I am of the firm opinion that the object of granting stay would be defeated by delay if stay is not granted. Therefore, if stay is granted against the decree passed by the Civil Judge, no harm or injustice will be caused to the plaintiff. The defendant No. 1 has prima-facie satisfied me on this point that there is sufficient reason to grant stay, as prayed for.

22. In my view, considering the nature of the suit and appeal it is necessary in the interest of justice to stay the decree under Order XLI Rule 5(1) of the C.P.C. Therefore, keeping in mind the legal principles, supra I am inclined to stay the decree under Order XLI Rule 5(1) of the C.P.C.

23. After giving thoughtful consideration to the facts of the case and the averments made by the defendant No. 1 in this application I am of the considered view that the decree is executable decree. Therefore, the application is legal and tenable and deserves to be granted.

24. Moreover, the reasons given in the application by the defendant No. 1 to grant stay are sufficient. Above all, no loss will cause to the plaintiff if the application is granted. On the other hand if the application is rejected the plaintiff will definitely try to execute the decree causing hurdles to get settled the alleged rights of the defendant No. 1. Therefore, also the application deserves to be granted.

25. Above all, if stay is not granted the plaintiff will execute the decree which will give rise to various revenue litigations. Therefore, in order to avoid multiplicity of proceeding and to secure ends of justice I

am inclined to grant this application.

26 I am unable to persuade myself with the arguments advanced by Shri. Ghadage, advocate for the plaintiff that as the suit is decreed on merits that too after 22 years it is not necessary to stay the decree. The reasons are :-

- That the fear which the defendant No. 1 is showing in order to stay the decree lead me to infer that the decree is an **executable decree** attracting Order XLI Rule 5(1) of the C.P.C.
- That if decree is not stayed the plaintiff will press to get execute the decree.
- That in my firm view the contentions of the defendant No. 1 in this application are sufficient to conclude that the decree is executable and as such can be stayed under Order XLI Rule 5(1) of the C.P.C.

27. In short, relying on the principles discussed, supra and the facts and circumstances of the case, I am inclined to grant this application.

28. However, considering the nature of the decree as that of partition and possession, I am of the firm view that the decree cannot be stayed in toto and it is required to be clarified that the Court and Collector are at liberty to complete the entire procedure effecting partition except handing over separate possession as per shares determined by the decree, which will suffice the purpose of granting the stay and will protect valuable civil rights of the defendant No. 1.

29. Since I have decided this application on merit considering the prayer in the application (Exhibit 19) it is not required to be decided, separately. Therefore, it is not necessary to pass any speaking

order on the application (Exhibit 19) and the purpose will be served if the application (Exhibit 19) is merely filed.

30. I leave open the contentions of the parties on the merits of the decision in this appeal.

31. Accordingly, I answer Point No. 1 in the affirmative and Point No. 2 as application granted as per final order.

32. In the result, the following order.

**ORDER**

1)	The judgment and decree dated 05/03/2018 passed by the Joint Civil Judge, Junior Division, Mangalwedha in the Regular Civil Suit No. 2/2013, is stayed till further order.
2)	The Court and Collector executing the judgment and decree in the Regular Civil Suit No. 2/2013 are directed to complete the entire procedure for effecting partition as per shares determined by the judgment and decree, except delivery of possession.
3)	The application (Exhibit 19) is filed.

(Pronounced in Open Court)

Date : 03/12/2021

(M. B. Lambe),  
District Judge-1,  
Pandharpur.

**C E R T I F I C A T E**

I affirm that the contents of this PDF file Order is same word to word as per the original Order.

- (a) Name of the Stenographer : Sou. M. M. Kulkarni
- (b) Court : M. B. Lambe,  
District Judge – 1 &  
Addl. Sessions Judge, Pandharpur.
- (c) Order signed by P.O. on : 03/12/2021
- (d) Order uploaded on : 06/12/2021