

**ORDER BELOW APPLICATIONS (EXHIBIT 5 AND 14) IN THE
REGULAR CIVIL APPEAL NO. 44/2020
(KONDIBA & OTHS. VS. SAUBAI & OTHS.)
(PASSED ON 22/02/2022)**

Nature of the Application.

1. These are the applications filed by the appellants (for short 'defendant Nos. 1 to 5') for stay the Judgment and decree dated 10/11/2020 (for short 'decree') passed by the Joint Civil Judge, Junior Division, Mangalwedha (for short 'Civil Judge') in the Regular Civil Suit No. 182/2017 (for short 'suit').

Contents in the Application.

2. The defendant Nos. 1 to 5 have contended that the respondent Nos. 1 to 5 (for short 'plaintiffs') filed suit seeking partition, separate possession and declaration. The suit is decreed.

3. The Civil Judge has not considered the facts and evidence on record in respect of previous partition of the suit-lands and arrived at wrong conclusion without framing issue to that effect and decreed the suit. The plaintiffs are 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 plaintiffs will try to execute the decree. If the plaintiffs are allowed to do this, it will cause irreparable loss to the defendant Nos. 1 to 5 which cannot be compensated in terms of money. The defendant Nos. 1 to 5 have 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 Nos. 1 to 5 have prayed to grant the applications.

Contents in the Say of the Plaintiff Nos 1 to 4.

6. The plaintiff Nos. 1 to 4 have filed say (Exhibit 11 and 17)

and have strongly objected the application.

7. The plaintiff Nos. 1 to 4 have contended that the applications are not legal and tenable. The plaintiff Nos. 1 to 4 have succeeded in proving that they are entitled for 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 applications.

8. On these grounds the plaintiff Nos. 1 to 4 have prayed to reject the applications.

The Argument.

9. I have heard Shri. K. B. Dharurkar, advocate for the defendant Nos. 1 to 5 and Shri. R. D. Kulkarni, advocate for the plaintiff Nos. 1 to 4, at length.

10. They argued in consonance with their contention in the 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 :-

5. **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.**

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|-----|---------------|---|---|---|---|---|---|---|
| | Explanation – | X | X | X | X | X | X | X |
| (2) | 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) | X | X | X | X | X | X | X | X |
|-----|---|---|---|---|---|---|---|---|
- (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.

13. Thus, it is clear that no stay of execution of a decree can be granted unless the conditions in Order XLI Rule 5 (3) of the C.P.C., are satisfied.

14. The giving of security-bond is a step in judicial procedure before an order for stay can be granted. The execution of a security-bond does not effect transfer of rights in the immovable property described therein so as to make it available for the satisfaction of the decree that might be passed by the appellate Court, but it is an order of the Court accepting the security-bond which creates these rights. The security-bond does not become operative unless and until it is accepted by the Court. The security-bond hypothecating immovable property executed under Order XLI Rule 5 in Form No. 3 Appendix 'G' of the C.P.C., does not require registration either under the Registration Act or of the Transfer of Property Act. The security-bond is even not liable to be stamped under the Stamp Act, but is liable for payment of court-fee

under the Court-fees Act. The sufficiency of the surety offered is a matter primarily for the Civil Judge/Executing Court to determine.

15. The giving of security-bond is a step in judicial procedure before an order for stay can be granted. The execution of a bond does not effect transfer of rights in the immovable property described therein so as to make it available for the satisfaction of the decree that might be passed by the appellate Court, but it is an order of the Court accepting the security-bond which creates these rights. The security-bond does not become operative unless and until it is accepted by the Civil Judge/Executing Court.

Points and Findings.

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

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

Reasons as to Point Nos. 1 and 2.

17. The defendant Nos. 1 to 5 have contended that the plaintiff Nos. 1 to 4 are intending to execute the decree which will cause irreparable loss to them.

18. It transpires from the decree that the plaintiffs have succeeded in proving that the suit-lands are the undivided joint family properties and they are entitled for partition in the suit-lands, prima-

facie. This finding is based on the oral and documentary evidence led by the parties.

19. After going through the pleadings of both parties and the evidence led by them, it is prima-facie clear that the plaintiffs and the defendant Nos. 1 to 5 are having arguable points in their favour.

20. The defendant Nos. 1 to 5 have challenged the decree, in this appeal. The decree is required to be re-judged and pending such adjudication if it is executed, in the event of their ultimate success, the suffering of the defendant Nos. 1 to 5 may become irreversible. Therefore, the applications deserve to be granted, at this stage.

21. 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.

22. After carefully considering all the relevant aspects, it is clear that the decree is in respect of partition of the suit-lands and according to the defendant Nos. 1 to 5, there was previous partition and the Civil Judge decided the suit without framing issue to that effect, in my opinion, this is sufficient reason to grant these applications and there are no exceptional reasons existing which requires the rejection of the same, at this stage.

23. After going through the decree 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 Nos. 1 to 5 will be prejudiced and they will suffer substantial loss. Under these facts and circumstances the court's interference is necessary to protect the defendant Nos. 1 to 5's legal rights.

24. 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, no harm or injustice will be caused to the plaintiff Nos. 1 to 4. The defendant Nos. 1 to 5 have prima-facie satisfied me on this point that there is sufficient reason to grant stay.

25. 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.

26. After giving thoughtful consideration to the facts of the case and the averments made by the defendant Nos. 1 to 5 in these application I am of the considered view that the decree is executable decree. Therefore, the applications are legal and tenable and deserve to be granted.

27. Moreover, the reasons given in the applications by the defendant Nos. 1 to 5 to grant stay are sufficient. Above all, no loss will cause to the plaintiff Nos. 1 to 4 if the applications are granted. On the other hand if the applications are rejected the plaintiff Nos. 1 to 4 will definitely try to execute the decree causing hurdles to get settled the alleged rights of the defendant Nos. 1 to 5. Therefore, also the applications deserve to be granted.

28. Above all, if stay is not granted the plaintiff Nos. 1 to 4 will execute the decree which will give rise to various revenue and other litigations. Therefore, in order to avoid multiplicity of proceedings and to secure ends of justice I am inclined to grant these applications.

29. I am unable to persuade myself with the arguments advanced by Shri. Kulkarni, advocate for the plaintiff Nos. 1 to 4 that as the suit is decreed on merit that too after nearly 3 years it is not necessary to stay the decree. The reasons are :-

- That the fear which the defendant Nos. 1 to 5 are 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 Nos. 1 to 4 will press to get execute the decree.
- That in my firm view the contentions of the defendant Nos. 1 to 5 in these applications 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.

30. In short, relying on the principles discussed, supra and the facts and circumstances of the case, I am inclined to grant these applications.

31. 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, as prayed and in view of Order XLI Rule 5(3)(c) and (5) of the C.P.C. and the defendant Nos. 1 to 5 are entitled to the grant of stay to the execution of the decree pending appeal on stringent conditions in order to lessen the intensity of the apprehension expressed by the plaintiff Nos. 1 to 4 in their say and argument.

32. Therefore, considering the purpose of granting the stay, in order to safeguard the interests of the plaintiffs and to protect their as well as of the defendant Nos. 1 to 5's valuable civil rights, it is necessary to direct the defendant Nos. 1 to 5 to pay the cost awarded by the Civil Judge and to give security-bond for the due performance of the decree as may ultimately be binding upon them.

33. The defendant Nos. 1 to 5 have been directed under the terms of the decree to pay Rs. 664/- to the plaintiffs as costs. Therefore,

it is necessary to direct the defendant Nos. 1 to 5 to deposit this cost amount in the Court of the Civil Judge/Executing Court for payment to the plaintiffs. The amount so deposited will be paid to the plaintiffs on their furnishing security for the amount to be withdrawn by them from the Court of the Civil Judge/Executing Court. If the defendant Nos. 1 to 5 fail to deposit the cost amount in the Court of the Civil Judge/Executing Court the applications shall stand rejected, automatically.

34. Further, it is also necessary to direct the defendant Nos. 1 to 5 to give security-bond for the due performance of the decree as may ultimately be binding upon them. The amount of security-bond is quantified at Rs. 5,00,000/- considering the nature of the suit, the appeal and legal rights of the plaintiffs. The question as regards sufficiency of the surety offered by the defendant Nos. 1 to 5 is a matter primarily for the Civil Judge/Executing Court to determine. If the defendant Nos. 1 to 5 are not in a position to furnish security-bond of a solvent surety to the extent of Rs. 5,00,000/- under Order XLI, Rule 5(3)(c) in Form No. 3, Appendix 'G' of the C.P.C., stay of execution of the decree cannot be granted and the applications shall stand rejected, automatically and the plaintiffs will be entitled to proceed in execution asking for the partition and for delivery of possession.

35. The Civil Judge/Executing Court will submit a report to this Court after depositing cost amount and giving security-bond stating how far the defendant Nos. 1 to 5 have complied with the terms of the order.

36. Moreover, 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.

37. It is made clear that the observations made in this order are made for the limited purpose of these applications only and shall not have any effect on the merits of the appeal and all parties are at liberty to agitate their respective cases at the time of hearing on merit without being prejudiced even in the least by any of the observations made in this order.

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

39. In the result, the following order.

ORDER

1)	The applications (Exhibit 5 and 14) are granted, partly.
2)	The judgment and decree dated 10/11/2020 passed by the Joint Civil Judge, Junior Division, Mangalwedha in the Regular Civil Suit No. 182/2017, is stayed till further order on following conditions :-
(i)	The Court and Collector executing the judgment and decree in the Regular Civil Suit No. 182/2017 are directed to complete the entire procedure for effecting partition as per shares determined by the judgment and decree, except delivery of possession.
(ii)	The defendant Nos. 1 to 5 are directed to deposit the cost amount in the Executing Court for payment to the plaintiffs on or before 02/03/2022, failing which the applications (Exhibit 5 and 14) shall stand rejected, automatically and the plaintiffs will be entitled to proceed in execution asking for the partition and for delivery of possession.
(iii)	The defendant Nos. 1 to 5 are directed to give security-bond of a solvent surety to the extent of Rs. 5,00,000/- (Rs. Five Lakhs only) under Order XLI, Rule 5(3)(c) of the C.P.C. in Form No. 3, Appendix 'G' of the Code of Civil Procedure, for the due performance of the decree as may

	ultimately be binding upon them, on or before 02/03/2022, failing which the applications (Exhibit 5 and 14) shall stand rejected, automatically and the plaintiffs will be entitled to proceed in execution asking for the partition and for delivery of possession.
3)	The plaintiffs are at liberty to withdraw the cost amount, from the Executing Court, on their furnishing security for the cost amount to be withdrawn by them.
4)	The Executing Court is directed to submit a report to this Court after depositing the cost amount and giving security-bond of a solvent surety stating how far the defendant Nos. 1 to 5 have complied with the terms of the order.

(Pronounced in Open Court).

Date : 22/02/2022

(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 : 22/02/2022
- (d) Order uploaded on : 24/02/2022