



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

923 WRIT PETITION NO. 9283 OF 2025

MOHAMMAD RAFI SHAHUL HAMID

VERSUS

M.S POKHARNA BROTHERS THROUGH ITS PARTNER SANJAY A.
POKARNA

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Mr. P.R. Katneshwarkar, Senior Counsel i/b. Mr. G.R. Syed – Advocate for
Petitioner

Mr. M.S. Kabra – Advocate for sole Respondent

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CORAM : MANJUSHA DESHPANDE, J.

DATE : 19.08.2026

ORDER :

1. Heard learned Senior Counsel for the petitioner and learned
Counsel for sole the respondent.

2. Learned Senior Counsel Mr. P.R. Katneshwarkar for the petitioner
submits that the petitioner is the original defendant in Special Civil Suit
No.7 of 2021, whereas the respondent herein is the original plaintiff. The
said suit was filed for recovery of an amount of Rs.4,74,00,000/-. The
suit came to be decreed in favour of the plaintiff, directing the defendant
to pay an amount of Rs.3,11,56,151/- i.e. the principal amount adjudged
to be due to the plaintiff, within a period of three months from the date
of the order, together with interest at the rate of 6% per annum from
01.03.2018 till the date of the suit, and further interest at the rate of 6%
per annum from the date of the suit till realization of the entire amount.

3. Learned Senior Counsel submits that the decree came to be passed without any written statement by the defendant, an order to that effect was passed on 12.10.2021. It is further submitted that the defendant could not lead evidence since the Advocate engaged by him was not in contact with him. According to the learned Senior Counsel, the parties were residing in Kerala, whereas the suit was instituted in the State of Maharashtra and, due to lack of communication during the relevant period, the defendant could neither file his written statement nor could lead evidence, resultantly the suit was decreed against him. It is submitted that after getting knowledge of the decree, the petitioner preferred Regular Civil Appeal No.12 of 2024, before the learned District Judge-2, Shrigonda. The petitioner also filed an application at Exhibit 5 seeking stay to the judgment and decree passed in the suit. The said application came to be decided by the learned District Judge-2, Shrigonda, by order dated 21.01.2025.

4. Learned Senior Counsel has invited the attention of this Court to paragraph 7 of the said order, wherein the learned District Judge has observed that “the appellant has not made out any exceptional case to stay the operation and execution of the decree. If the Court is inclined to stay the execution and operation of money decree the same may be stayed by directing the appellant to make deposit of the decreetal amount or to furnish security”. He further submits that though the learned

District Judge noticed both the alternatives available under Order XLI of the Code of Civil Procedure, 1908, the petitioner was directed to deposit 50% of the decretal amount within a period of three months. According to him, the discretion vested in the Appellate Court ought to have been exercised judicially by permitting the petitioner to furnish security instead of directing deposit of 50% of the decretal amount. In support of his submissions, he places reliance upon the judgment of the Hon'ble Supreme Court in case of Sihor Nagar Palika Bureau Vs. Bhabhlubhai Virabhai and Company reported in 2005 DGLS (SC) 390, more particularly paragraphs 6 to 8 thereof, which read as under :

“6. Order XLI Rule 1(3) of the CPC provides that in an appeal against a decree for payment of amount the appellant shall, within the time permitted by the Appellate Court, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit. Under Order XLI Rule 5(5) a deposit or security, as abovesaid, is a condition precedent for an order by the Appellate Court staying the execution of the decree. A bare reading of the two provisions referred to hereinabove, shows a discretion having been conferred on the Appellate Court to direct either deposit of the amount disputed in the appeal or to permit such security in respect thereof being furnished as the Appellate Court may think fit. Needless to say that the discretion is to be exercised judicially and not arbitrarily depending on the facts and circumstances of a given case. Ordinarily, execution of a money decree is not stayed inasmuch as satisfaction of

money decree does not amount to irreparable injury and in the event of the appeal being allowed, the remedy of restitution is always available to the successful party. Still the power is there, of course, a discretionary power and is meant to be exercised in appropriate cases.

7. In the Memo of Appeal filed by the appellant in the High Court, very many pleas have been raised. One of the grounds taken is that the decree has been passed by the Trial Court without availability of any legal evidence amounting to proof in favour of the respondent and hence the decree is ex-facie erroneous. The grounds urged in favour of the prayer for stay set out for the consideration of the High Court as an Appellate Court have been briefly noticed hereinabove. We do not propose to deal with the merits of the pleas so urged lest it should prejudice the hearing of the appeal in the High Court. Suffice it to observe that a case for grant of stay was made out even in the opinion of the High Court and the dispute which survived lay in a narrow compass : Whether to insist on deposit in cash or permit a security being furnished?

8. In the facts and circumstances of the present case and having taken into consideration the respective submissions made by the learned counsel for the parties in very many details, we are satisfied to hold that the High Court ought to have permitted furnishing of security instead of insisting on deposit in cash of the amount as directed by the High Court. It is not the case of the respondent that in the event of the appeal being dismissed the decretal amount may not be recovered from the

appellant. On the other hand, the appellant has made out a prima facie strong case for the hearing of the appeal on its merits and further a case that public interest would be better served by the amount being retained by the appellant during the pendency of the appeal. While making these observations, we should not be understood as having made any observation touching the merits of the case amounting to pre-judging any of the issues arising for decision in the appeal and ex abundanti cautela we clarify that the appeal shall be heard by the High Court on its own merits uninfluenced by anything said in this order. The appellant has already furnished security of immovable property to the satisfaction of the Trial Court pursuant to the order dated 31.2.2004 passed by this Court.”

5. Per contra, learned Counsel for the respondent opposes the prayer. It is submitted that the petitioner himself was responsible for not filing the written statement and not leading evidence before the Trial Court and that the decree came to be passed as a consequence of the petitioner's own failure to participate effectively in the proceedings.

6. I have considered the submissions advanced by the learned Counsel for the respective parties and have gone through the impugned order and the judgments relied upon by the learned Counsel.

7. The decree passed by the learned Civil Judge, Senior Division, Shrigonda, in Special Civil Suit No.7 of 2021 is not in dispute. It is also not in dispute that the suit proceeded without a written statement of the

defendant and that an order to that effect was passed on 12.10.2021. During the aforesaid period the whole world was affected by COVID-19 pandemic. In such situation, the circumstances prevailing during the said period, coupled with the fact that the defendant was residing outside the State, ought to have been considered while examining the prayer for stay of execution of the decree.

8. The decree passed by the Trial Court is the subject matter of challenge in Regular Civil Appeal No.12 of 2024. While considering the application at Exhibit 5, the learned District Judge noticed that the petitioner had not participated effectively in the trial and had not led evidence. The discretion vested in the Appellate Court under Order XLI Rules 1(3) and 5 of the Code of Civil Procedure was, therefore, required to be exercised in a judicious manner upon consideration of the peculiar facts and circumstances of the case.

9. In the facts of the present case, having regard to the nature of the decree, the circumstances in which the suit proceeded without a written statement or evidence on behalf of the defendant, and the fact that the petitioner has already challenged the decree in appeal, this Court is of the view that the interest of the respondent/plaintiff can adequately be protected by directing the petitioner to furnish solvent security for the decretal amount.

10. The judgment relied upon by the learned Senior Counsel in **Sihor Nagar Palika Bureau** (*supra*) supports the proposition that the Appellate Court has discretion to permit furnishing of security instead of insisting upon deposit of the decretal amount. The said discretion has to be exercised judicially, having regard to the facts and circumstances of each case. The judgment relied upon in the impugned order, namely, **Malwa Strips Pvt. Ltd. Vs. Jyoti Ltd.**, 2009 AIR SCW 1113, also reiterate that stay of execution of a decree is not to be granted as a matter of course and that appropriate conditions may be imposed for protecting the interest of the decree-holder.

11. In view of the above, the order passed by the learned District Judge-2, Shrigonda, below Exhibit 5 is modified only to the extent that, instead of depositing 50% of the decretal amount, the petitioner shall furnish solvent security to the satisfaction of the Appellate Court for the entire decretal amount within a period of one (1) month from today.

12. The impugned order is modified to the aforesaid extent only.

13. The Writ Petition stands disposed of accordingly.

14. Pending Civil Applications, if any, also stand disposed of.

[MANJUSHA DESHPANDE, J.]