

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**APPEAL FROM ORDER NO.115 OF 2014
WITH
CIVIL APPLICATION NO.12833 OF 2014**

Bhimrao Shankarrao Kawade,
Age 52 years, occ. Agri.,
r/o. Village Washi, Tq. Washi,
Dist. Osmanabad ..Appellant

Versus

Navnath Vyankat Kawade,
Age 41 years, occ. Agri.,
r/o. Vilage Washi, Tq. Washi,
Dist. Osmanabad ..Respondent

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Mr.V.S.Undre, advocate for appellant

Mr.N.S.Tekade, advocate for respondent

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CORAM : M.T. JOSHI, J.

DATE : APRIL 18, 2015

PER COURT :

Heard both sides.

2] **Admit.** By consent of the parties, taken up for
final disposal.

3] The facts would reveal that the present appellant had filed a suit for specific performance of the contract regarding immovable property in the trial Court. The respondent/defendant remained absent in the suit and, therefore, the suit was proceeded *ex-parte*, which came to be decreed. Thereafter, execution proceedings was filed. In the execution proceedings also, summons was served on the respondent/defendant.

4] Thereafter, the respondent filed Regular Civil Appeal No. 481 of 2014 in the District Court. Learned District Judge-1, Bhoom, set aside the decree passed by the trial Court in favour of the present appellant and remanded the case to the trial Court, subject to payment of costs of Rs.5,000/- to be paid to the present appellant within two weeks from the date of the judgment. Aggrieved by the said judgment, present Appeal From Order is preferred by the original plaintiff.

5] Considering the material on record, it is found that the present appellant had, earlier, also filed a Regular Civil Suit No. 21 of 2009 against the present respondent seeking transfer of the very same property claiming right of per-emption. According to him, during pendency of the earlier suit, an oral agreement was entered into between the parties for sale of the property.

6] Learned counsel for the respondent submits that the suit summons was not properly served on the respondent/defendant.

7] Upon hearing both sides and considering the fact that the respondent has failed to appear twice i.e. once in the suit and thereafter, in the execution proceedings, in my view, the judgment of learned District Judge cannot be called as unreasonable. However, considering all the facts on

record, learned District Judge ought to have directed the present respondent/defendant to pay costs of Rs.10,000/- instead of Rs.5,000/-, further subject to the condition that in case, ultimately, the suit is dismissed on merit by learned trial Court, the present appellant/plaintiff shall refund the said amount of costs to respondent/defendant.

8] In view of above, the following order :-

a] The Appeal From Order is hereby partly allowed without any order as to costs.

b] The order dated 10th September, 2014 passed by learned District Judge-1, Bhoom, is quashed and set aside.

c] Instead of payment of costs of Rs.5,000/- as directed by learned District Judge-1, Bhoom, the appellant is hereby directed to pay costs of Rs.10,000/- within a period of two weeks from the

date of this order, subject to the further condition that in case, the suit of the present appellant is dismissed by the trial court on merit, the trial Court shall direct for recovery of said costs from present appellant/plaintiff, along with the regular costs of the suit.

d] Learned trial court shall not be influenced by the observations made above and the suit shall be decided on its own merits.

e] In view of disposal of Appeal From Order, the Civil Application does not survive and stands disposed of as such.

[M.T. JOSHI, J.]

kbp