

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 4809 OF 2016

1. Mohammad Moizul Hasan S/o Abdul Aziz,
Aged about : 32 years, Occu: Service,
R/o. : Plot No: 19, Madina Beef Shop,
Silk Mills Colony, Aurangabad
 2. Mohammad Shaker S/o Mohammad Hussain,
Aged about : 57 years, Occu : Driver,
R/o : Plot No.19, Madina Beef Shop,
Silk Mills Colony, Aurangabad
 3. Khairunisa Begum w/o Mohammad Shaker,
Age about : 51 years, Occu : Housewife,
R/o: Plot No: 19, Madina Beef Shop,
Silk Mills Colony, Aurangabad
 4. Sk. Badruddin S/o Sk. Chand,
Aged about :85 years, Occu: Nil,
R/o: M.H.No. 5-28-116/P, CTS No. 18787,
Silk Mills Colony, Aurangabad
 5. Zubeda Begum w/o Sk. Badruddin,
Aged about : 75 years, Occu : Household,
R/o: M.H. No. 5-28-116/P, CTS No. 18787,
Silk Mills Colony, Aurangabad
- .. Petitioners

Vs.

Seema Quazi w/o Mohammad Ismail,
Aged about : 46 years, Occ : Household,
R/o : Silk Mills Colony, Aurangabad

.. Respondent

Mr. V.I. Thole, Advocate for the petitioners
 Mr. A.D. Kasliwal, Advocate for the respondent

CORAM : SUNIL P. DESHMUKH, J.
DATE : 28-04-2016

ORAL JUDGMENT :

Rule. Rule made returnable forthwith. Heard finally with consent of the parties.

2. The petitioners, aggrieved by the order dated 19-4-2016 upon an application Exhibit 10 in regular civil appeal no. 32 of 2015 pending before the district judge-7, Aurangabad, whereunder their request for extension of time to deposit the amount has been rejected, are before this Court.

3. Briefly stated the facts are that the suit had been instituted for the possession by the respondent against the present petitioners. The suit has been decreed and as such the present petitioners had preferred aforesaid regular civil appeal which is pending. During the pendency of the appeal, the petitioners had also preferred an application praying for stay to the operation and effect of the impugned decree in the appeal. The appellate court had passed an order on the stay application as follows :

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ORDER

1. The application is partly allowed.

2. The execution of the judgment and the decree passed in Spl. C.S. No.56/2013, on 18th December 2014 passed by the 7th Jt. Civil Judge (Senior Division) Aurangabad is hereby stayed subject to the condition that the appellants to deposit the amount ordered by the Ld. Lower Court within a period of four weeks from the date of order.

3. The respondent shall be entitled to withdraw the deposited amount without furnishing any security and in the event the appellant fails to comply with the order, the stay shall be vacated at once.

4. Costs to follow events. "

4. Aggrieved by the said order putting condition of making payment, the petitioners had been before this Court in writ petition bearing no. 7402 of 2015. The writ petition came to be dismissed by this Court vide its order dated 23-11-2015. It was thereafter, the petitioners had deposited the amount pursuant to the order passed by the appellate Court on stay application albeit in installments and application Exhibit 10 has been moved for continuation of the interim relief by granting extension of time. It is this application, which has been rejected by the appellate court. Reasons which have weighed for rejection of the application have been summarized by the court in its order, in paragraphs no.4 and 5, which read thus :

"4. Heard learned Advocates for parties. No doubt, that the Court should be liberal for the purpose of extension of time and Courts are not helpless in applications of the kind under consideration. U/sec 151 of the Civil Procedure Code, the Court has a power to enlarge the time originally fixed and to grant further indulgence to the parties in default, if really the case merited such indulgence. In the instant matter the appellants were directed to deposit the amount as ordered by the Lower Court within 4 weeks. The appellant challenged the said Order by Writ Petition which was finally disposed off in the month of November, 2015. Despite, he moved an application on 23.3.2016 for extension of

time. No reason is stated for delay. The Court has to also see the rights of the other side also.

5. Now, if we see the Order passed by this Court on 25.6.2015, there is a condition attached with the Order that in case the amount is not deposited within the period of 4 weeks, the said Order would become inoperative. It is the conditional Order which has not been complied with by the appellants. The conditional Order has worked itself out, and so the application filed by the appellants u/sec 148 of C.P.C. beyond the period fixed can not be entertained. Where such Order is passed and the condition is not fulfilled within the time specified therein, the application automatically gets dismissed.

In view of the aforesaid reasons the application stands dismissed."

5. Learned counsel for the petitioner Mr. V.I. Thole submits that looking at the events as have occurred, in which the petitioners had been legitimately prosecuting the remedies having been aggrieved by the orders passed by the appellate court while granting stay and after its culmination into the order of the High Court, they have duly substantially complied with the conditions, as had been imposed while granting stay. In the course, since they were aggrieved and hard pressed, they could not comply with the order earlier and had tried to challenge the same by approaching the High Court. While challenge was found to be not sustainable by the High Court, thereafter, the conditions were complied with. However, they are now considered to be not in adherence to the conditions imposed.

6. The learned counsel further submits that petitioner nos.4 and 5 are old aged persons, who are parents-in-law of the respondent residing in the suit property. It is them, who would be directly affected if the decree is allowed to be executed. It was not within their means and control to comply with the order immediately within the stipulated period. Persons who were capable to comply with the order are not likely to be affected due to execution of the decree immediately. He submits that the appeal is continuation of the suit and it cannot be said that by the decree, adjudication of the rights of the parties to the suit property has finally taken place and the adjudication of rights of the parties is still wide open, as it were in the suit.

7. The learned counsel submits that even if it is assumed that the order of the appellate court has merged into the order of this Court, this Court can consider the request for extension of time for complying with the order and the writ petition be given treatment accordingly.

8. Mr. A.D. Kasliwal, learned counsel appearing for the respondent/plaintiff with vehemence and exuberance has opposed the request now being made in the writ petition. He submits that the order on stay application having got merged into the order of this Court in the earlier round of litigation, it would not be open for the Court to consider the request since a bar analogous to the doctrine of *res judicata*, as has been held by the Supreme Court time and again

would be applicable. He further submits that no indulgence be given to the request being made because petitioners nos.1 to 3 are able bodied persons and have all the means and capacity to comply with the order immediately and yet have waited till passing of order by this Court in the earlier writ petition.

9. The conspectus overall leads to the situation, wherein it is the petitioners nos.4 and 5 who would be hit the most by execution of decree and the rest of the petitioners would not be affected as much as the petitioners nos.4 and 5.

10. Aforesaid aspect goads me to consider the request made by the petitioners. The matter at the instance of the petitioner is in this Court aggrieved by refusal to extend time under section 148 of the Code of Civil Procedure. Since it is being contended that there is merger of the conditional order passed earlier by the appellate Court into the order of this Court in earlier writ petition, it would not be such a case in present matter and it would not be that the petitioners have been prohibited from seeking the opportunity and request this court for extension of time. The requisite compliance under due obedience appears to have been made. In the circumstances, the discretion of this Court is required to be flexed to suit the situation. The writ petition as such is being considered for extension of time for compliance of condition for interim relief, which would be in operation during the pendency of the appeal. As such the impugned order is set aside.

Period as granted for compliance of the order passed on stay application by the appellate Court shall be deemed to have been extended to the date of compliance as it stated to have been made.

11. The writ petition is allowed, setting aside the order impugned order and rule is made absolute in terms of prayer clause (2) of the writ petition. It is however further made clear that as the appeal is pending since 2011, and while it has been stated that it is pending for preparation of the paperbook, the preparation of paperbook be expedited and be prepared within six weeks from the date of receipt of writ of this order and upon the same, appeal to proceed with expeditiously preferably within a period of eight weeks thereafter and be disposed of.

**[SUNIL P. DESHMUKH]
JUDGE**

arp/