

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 1427 OF 2016

MR. ANIL SHYAMSUNDAR NESARI

...Petitioner

Versus

MR. SHAM KANDOPANT KULKARNI
AND ORS.

...Respondents

....

Mr. Mahesh Rawool h/f. Avinash B. Avhad, Advocate for the
Petitioner.

Mr. Sham K. Kulkarni, respondent No.1 present in person.

....

CORAM : R. G. KETKAR, J.

DATE : 18th MARCH, 2016

P.C.

1. Heard Mr. Mahesh Rawool, learned Counsel for the petitioner and respondent No.1 in person, at length. Mr. Rawool seeks permission to delete respondent Nos.2 to 5 as respondent No.1 is the only contesting respondent. In view thereof, on oral application made by Mr. Rawool, leave to amend as prayed for is granted. Amendment shall be carried out forthwith.

2. Rule. Respondent No.1 waives service. At the request and by consent of the parties, Rule is made returnable forthwith and the petition is taken up for final hearing.

3. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the order dated 28.11.2015 passed by the learned Civil Judge, Senior Division, Pune below Exhibit-6 in Miscellaneous Application No.577 of 2015. By that order, the learned trial Judge declined to stay the execution proceedings.

4. Mr. Rawool submitted that respondent No.1, hereinafter referred to as plaintiff, had instituted Special Summary Suit No.240 of 2009 against the petitioner, hereinafter referred to as defendant No.6 and respondents No.2 to 5, hereinafter referred to as defendants No.1 to 5 for recovery of Rs.3,67,500/-. The Suit was decreed on 31.03.2011. Defendants were jointly and severally directed to pay Rs.2,70,000/- with interest @ 6% p.a. with effect from 13.12.2006 till total satisfaction of the decretal amount to the plaintiff.

5. Defendant No.6 took out Miscellaneous Application No.577 of 2015 under Order 9, Rule 13 of the Code of Civil Procedure, 1908 for setting aside the ex-parte decree. Defendant No.6 filed application exhibit-6 for staying the execution of the

decree. By the impugned order, the learned trial Judge declined to grant stay.

6. Mr. Rawool submitted that the total decretal amount comes to Rs.4,77,974/-. Defendant No.6 deposited Rs.1,36,275/- on 30.9.2015, which is evident from receipt at exhibit-C page 29. Defendant No.6 had further deposited amount of Rs.2,72,550/- by cheque No.000055 dated 5.12.2015. He states that the said cheque is encashed. Thus, out of total decretal amount of Rs.4,77,974/-, defendant No.6 has paid an amount of Rs.4,08,825/-.

7. Mr. Rawool submitted that respondent No.1 who appears in person has not disputed that defendant No.6 has deposited an amount of Rs.1,36,275/- on 30.9.2015 . Even otherwise the same is evident from receipt at Exhibit-C page.29. Respondent No.1 has further not disputed that defendant No.6 has deposited an amount of Rs.2,72,550/- by cheque No.000055 dated 5.12.2015 which is also encashed. Thus, out of decretal amount of Rs.4,77,974/-, defendant No.6 has deposited/paid an amount of Rs.4,08,825/-.

8. By the impugned order, learned trial Judge rejected the application mainly on the ground that though defendant No.6 was directed to take necessary steps against all the opponents, still some of them were not served and, therefore, rejected the application. Respondent No.1 being decree holder is the only contesting respondent. As noted earlier, respondent No.1 does not dispute deposit/payment made by defendant No.6. In view thereof, the impugned order is set aside and application Exhibit-6 is allowed. As respondent No.1/plaintiff appears in the trial Court, learned trial Judge will not insist presence of other opponents as respondent No.1/plaintiff is the only contesting respondent and proceed with the hearing of application under Order 9 Rule 13 of CPC. Rule is made absolute accordingly with no order as to costs.

(R. G. KETKAR, J.)