

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.4869 OF 2017
(Kamal Annasaheb Jamdar and others Vs.Tukaram Jayram Jamdar
and others)

Mr.N.P.Jamalpurkar, learned counsel for the petitioners.
Mr.P.B.Shirsath, learned counsel for respondent No.1.

(CORAM : M.S.Sanklecha, J.)

DATE : 19/04/2017

PER COURT :

1. This petition under Article 227 of The Constitution of India challenges the order dated 18/11/2016 passed by the District Judge, Kopergaon. The impugned order, allowed an application filed by the respondent No.1 herein seeking a stay of the judgment and order of the Trial Court dated 15/11/2014 which was a result of a compromise arrived at between the parties to the proceedings.

2. The respondent No.1 (appellant before the District Court) was original defendant No.3 in the suit filed by petitioner No.1. However, before passing of the final decree, petitioner No.1 deleted the name of the respondent No.1 herein (defendant No.3 in the suit originally filed). It was thereafter that the parties who continued to appear on

the record of the Court arrived at a compromise and a decree was passed on 15/11/2014 in terms thereof. Being aggrieved, the respondent No.1 (original defendant No.3 in the suit) filed an appeal to the Appellate Court. In the appeal, the respondent No.1 i.e. original defendant No.3 sought a stay of the judgment and decree dated 15/11/2014 by the Appeal Court. However, the Appeal Court, by order dated 24/04/2015, rejected the application of the respondent No.1 (original defendant No.3) stating that no appeal u/s 96 of the CPC is maintainable and the appropriate application would be in terms of Order 23 Rule 3 of the CPC to set aside a consent terms arrived at between the parties.

3. Being aggrieved with the order dated 24/04/2015, respondent No.1 (original defendant No.3) filed Writ Petition No.7104/2015 in this Court. By an order dated 17/11/2015, this Court set aside the order dated 24/04/2015 of the Appellate Court and restored the issue to the Appellate Court for re-consideration on account of the following observations :-

“5. In my opinion, the impugned order passed by the learned District Judge is not sustainable, as Order XXIII, Rule 3 of the Code of Civil Procedure has hardly any application in view of the fact that the present petitioner was not a party to the compromise decree and has already preferred a substantive

appeal against the same.

6. *In view thereof, in my opinion, the impugned order is not sustainable and as such, the same is set aside. Learned District Judge-1, Kopargaon is directed to decide application Exh.5 preferred by the present petitioner on its own merits and in the light of the above referred observations.*

Writ petition stands allowed in above terms with no order as to costs.”

3. Consequent to the above order of this Court, the District Judge has now passed the impugned order staying the order dated 15/11/2014 of the Trial Court. The grievance of the petitioners before me is that no appeal under Section 96 of the CPC is maintainable and therefore the impugned order ought not to have granted any stay of the decree and order dated 15/11/2014 passed by the Trial Court. There is no substance in the submissions made on behalf of the petitioners. In fact this very issue has been considered by this Court in its order dated 17/11/2015 as reproduced above and the matter was restored to the Appellate Court to decide the matter afresh on merits. This after the Court took the view that Order 23 Rule 3 of the CPC has no application in the facts of the present case to invoke Section 96 of the CPC.

4. In the above view, the impugned order of 18/11/2016 does not suffer from any infirmity which would require exercise of a jurisdiction under Article 227 of the Constitution of India. In the above view, the petition is dismissed.

5. At this stage, I am informed that the appeal has been kept for hearing on 29/04/2017. Learned Counsel for the parties assure this Court that they will co-operate with the learned Appellate Court for an early disposal of the appeal filed by respondent No.1 herein.

(M.S.Sanklecha, J.)