

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.2135 OF 2017

Thane Municipal Corporation & Ors.

...Petitioners

Versus

Ultratech Cement Ltd.

...Respondent

.....

Mr.R.S.Apte, Senior Advocate i/b. Mr.N.R.Bubna for the Petitioners.
Mr.Nimay Dave a/w. Mr. Faisal Sayyed and Ms.P.Gandhi i/b. Manilal
Kher Ambalal & Co. for Respondent.

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**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: JULY 04, 2017**

P.C. :

1. Rule. Rule made returnable forthwith. By consent, petition is heard finally and disposed of at the stage of admission.

2. This petition is directed against the order dated 12.01.2017 passed by the learned Ad-hoc District Judge-1 & Additional Sessions Judge, Thane below Exhibit 10 in Civil Appeal No. 40 of 2016 wherein the learned Judge has directed the appellant to deposit 50% of the decretal amount with interest as directed by the trial Court accrued till the date of the order and the said amount is to be deposited within a period of one month from the date of the order. In Civil Appeal No. 40 of 2016, the judgment and decree dated 09.07.2015 passed in Special

Civil No. 435 of 2011 is under challenge. It pertains to the recovery of the penalty amount, which was levied by the Municipal Corporation before the respondent was convicted and thus there is a breach of Rule 35 (d) of the Octroi Rules. The said Suit was partly decreed. The learned Judge by an order dated 09.07.2015 directed the petitioner/defendant no.1- Municipal Corporation to refund the amount of Rs. 82,01,690/- with interest at the rate of 6% p.a. from 11.03.2011. Against the said order, the petitioner had filed Civil Appeal No. 40 of 2016. During pendency of the appeal, the petitioner had filed an application below Exhibit 10 for stay to the execution of impugned decree. While granting stay, the learned District Judge directed the petitioner-Municipal Corporation to deposit 50% of the decretal amount with interest in the trial Court.

3. The learned senior counsel for the petitioners submits that petitioner no.1 is a Corporation and the Municipal Commissioner, who is made a party defendant in the original Suit, is an appointed public officer and therefore, protection granted under Order 27 Rule 8 A of the Code of Civil Procedure, 1908 is to be extended to the Municipal Corporation. He further submits that no security is required under the said rule from the Government or Public Officer in certain cases. He further submits that the amount is a penalty recovered from the respondent, who has avoided to pay octroi by playing fraud on the

petitioner-Municipal Corporation. He further submits that under such circumstances, the petitioner-Municipal Corporation should not have directed to deposit 50% security amount. He further submits that the Commissioner as per Section 36 of the Maharashtra Municipal Corporations Act, is a public officer, who is appointed by the State Government and therefore, the Commissioner falls under Order 27 Rule 8A of the Code of Civil Procedure.

4. The learned counsel for the respondent submits that the money which is directed to be deposited is in fact the respondent's money, which is paid towards penalty under protest with the Municipal Corporation. He further submits that the provisions under Order 27 Rule 8A of C.P.C. cannot be applied to the petitioner-Municipal Corporation, as it is only meant for the State Government and the public officers working in the State Government as defined under Order 27 Rule 8B of C.P.C. He argues that the Suit is decreed in his favour and under Order 41 Rule (1) (3) while entertaining the appeal, the order to furnish security or deposit the amount is legal as the scheme of Order 41 Rule (1) (3) of CP.C. is of directory in nature. In support of his submission, he relies on the judgment of Division Bench of this Court in the case of **Civil Application No. 3994 of 2011 in First Appeal No. 1811 of 2011 (Times Global Broadcasting Co. Ltd. and Anr. Vs. Parshuram Babaram Sawant decided on 28.09.2011.**

5. In reply, learned senior counsel for the petitioners submits that Civil Appeal No. 3994 of 2011 was between the private parties and the security can be decided on the basis of status and character of the parties.

6. Heard submissions. Perused the order and ruling in **Times Global Broadcasting Co. Ltd and anr.** (supra) of the Division Bench of this Court. Under Order 41 Rule 1 (3) of C.P.C., the Court has power to direct the appellant to deposit the amount which the Appellate Court may think fit. Under Order 41 Rule 1 (3) of C.P.C., the Court can direct the party to deposit the amount as a condition precedent for granting stay in appeal. However, none of these provisions take away the discretionary power of the Court in respect of depositing security amount. The Court has to consider the character, status and credibility of the parties. The purpose behind obtaining the security is that if the appeal is dismissed, then decree holder should receive fruits of the decree i.e. his money. In the present matter, the appellant/petitioner is a Municipal Corporation and therefore, though the order of directing the Municipal Corporation to deposit some amount of security while granting stay cannot be faulted with, it being a Corporation, the amount can be reduced. The petitioner-Municipal Corporation is directed to

deposit 25% of the decretal amount with interest at the rate of 6% p.a. within a period of one month and rest of the order remain as it is.

7. In view of the above, Writ Petition is disposed of.

(MRIDULA BHATKAR, J.)