

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

24 WRIT PETITION NO. 4746 OF 2015

PRAMILA ANIL MOHITE
VERSUS
SHIVAJIRAO S/O PARASRAM MOHITE AND ANOTHER

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Advocate for Petitioner : Mr. Kore Ganesh J.
Advocate for Respondent Nos. 1 and 2 : Mr. A. L. Kanade

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CORAM : V. K. JADHAV, J.
DATED : 20th FEBRUARY, 2018

PER COURT:-

1. Heard finally with consent at admission stage.
2. The learned counsel for the petitioner/original plaintiff submits that the plaintiff has instituted Regular Civil Suit No. 478 of 2000 (old number) Regular Civil Suit No. 114 of 2008 (new number) for recovery of an amount against the respondents/defendants. Though the respondents were duly served and though they appeared in the Suit, failed to file their written statement. Thus, the trial Court, by judgment and decree dated 22.08.2002, decreed the said suit. Being aggrieved by the same, the respondents have preferred R.C.A. No. 138 of 2003

before the District Court, Osmanabad and the learned District Judge, Osmanabad, by judgment and order dated 14.11.2006, quashed and set aside the judgment and decree passed by the trial Court and remanded the matter to the trial Court with a specific direction that the respondents/original defendants shall file their written statement within 15 days from the date of receipt of the record and proceedings by the trial Court. The learned counsel submits that even then the respondents/defendants failed to file their written statement and again by the judgment and decree dated 22.02.2010, the trial Court has decreed the suit as against the respondents/defendants and directed the respondents/defendants to pay an amount of Rs.99,865/- to the petitioner/plaintiff. Being aggrieved by the same, the respondents have preferred R.C.A. No. 327 of 2014 and pending Appeal, filed an application Exhibit 16 for staying the effect of the judgment and decree passed by the trial Court. The learned Ad-hoc District Judge-1, Bhoom, by the impugned order dated 10.02.2015 passed below Exhibit 16, stayed the effect of the judgment and decree passed by the trial Court.

3. The learned counsel submits that it is a money decree and unless and until the amount is deposited before the lower appellate Court or the surety is furnished to that extent, the effect of the money decree cannot be stayed in the manner as ordered by the lower appellate Court.

4. The learned counsel for the respondents/original defendants submits that due to some health problems, the respondents/defendants could not file their written statement before the trial Court and accordingly, the trial Court has decreed the suit *ex parte* as against them. Being aggrieved by the same, the respondents have preferred R.C.A. No. 327 of 2014 and the lower appellate Court has stayed the effect of the *ex parte* judgment and decree passed by the trial Court by order dated 10.02.2015. The learned counsel submits that the said stay is operating since the year 2015 and now the Appeal is posted for final hearing.

5. It is well settled that in terms of the provisions of Order 41 Rule 5, in case an Appeal is preferred against a money decree, so long as the decretal amount is not deposited or the security is

not furnished, the Court shall not make an order staying the execution of the decree. In the instant case, the learned Ad-hoc District Judge-1, Bhoom has stayed the effect of the judgment and decree passed by the trial Court in a very casual manner. The petitioner-plaintiff has instituted the Suit way back in the year 2000 and till this date, the first appeal is pending before the lower appellate Court. In view of the same, even though the Appeal is now posted for final hearing, the application Exhibit 16, wherein the respondents/defendants have not shown any willingness to deposit the decretal amount or to furnish the surety, is thus liable to be rejected. Hence the following order:

ORDER

- I. The Writ Petition is hereby allowed. No Costs.
- II. The impugned order passed below Exhibit 16 in R.C.A. No.327 of 2014 dated 10.02.2015 is hereby quashed and set aside.
- III. The application Exhibit 16 is hereby rejected.
- IV. The Writ Petition is accordingly disposed of.

(V. K. JADHAV, J.)