

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

Writ Petition No. 955 OF 2020

Ashok S/o Narayan Thakare,
Aged about 44 years,
Occu. Agriculture,
R/o. Kupati, Post. Palashi,
Tq. Umarkhed, Dist. Yavatmal.

.... **Petitioner**

- **Versus** -

Awadhutrao S/o. Dadarao Thakare,
Aged about 53 years,
Occu. Agriculture,
R/o. Kupati, Post. Palashi,
Tq. Umarkhed, Dist. Yavatmal.

.... **Respondent**

Mr. V. N. Patre, Advocate for the appellant
None for the respondent

CORAM : MANISH PITALE, J.
DATED : 5-9-2022

ORAL JUDGMENT

Heard the learned counsel for the petitioner.

2. Rule. Rule made returnable forthwith.

3. By this petition, the petitioner i.e. the original plaintiff and decree holder has challenged order dated 23-10-2019 passed by

the Court of Joint Civil Judge (Junior Division), Umarkhed, District Yavatmal (executing court) whereby the application filed by the respondent (original defendant) and judgment debtor at Exhibit 18 has been allowed. As a consequence, the execution proceeding has remained stayed before the executing court.

4. Notice was issued in this writ petition as far as back on 18-2-2020. The sole respondent was served and he has chosen not to appear before this Court.

5. The learned counsel for the petitioner invited attention of this Court to judgment and order dated 20-6-2017 passed by the 2nd Joint Civil Judge (Junior Division), Umarkhed whereby a suit for specific performance filed by the petitioner stood allowed in the following manner.

“1) The suit is decreed.

2) The defendant is hereby directed to execute sale deed within two months from today in favour of plaintiff of suit property Gut No. 115/1 admeasuring 00.81 Ars out of 1 hector 49 Ars from Northern side situated at Kupati, Tq. Umarkhed, by accepting remaining amount of Rs. 50,000/- (Fifty thousand) from plaintiff. If the defendant fails to comply order of the Court, then

plaintiff is to deposit Rs. 50,000/- (Fifty thousand) in the Court and get sale deed executed in his favour through Court procedure.

- 3) If plaintiff fails to pay or deposit the remaining amount and get sale deed executed within time given to defendant, the suit shall be deemed to have been dismissed.*
- 4) Parties to bear their own costs.*
- 5) The decree be drawn up accordingly.”*

6. It is submitted that the respondent was aggrieved by the said judgment and decree and he filed an appeal before the District Court, but the appeal suffered from delay of 18 days. As a consequence, the respondent had filed an application for condonation of delay of 18 days in filing appeal. The said application was allowed by order dated 10-7-2018 passed by the Court of Ad-hoc District Judge-1, Pusad, Yavatmal (appellate court). The application stood allowed, subject to costs of Rs. 1,000/- to be deposited by the respondent on or before 24-7-2018, which were to be paid to the petitioner herein.

7. The respondent failed to deposit the amount of costs within the stipulated period of time and after about ten months i.e.

on 3-4-2019, the respondent filed miscellaneous application bearing MJC No. 24/2019 before the appellate court for permission to deposit amount towards costs beyond the time stipulated in the order dated 10-7-2018.

8. During the pendency of the said application before the appellate Court, the respondent filed an application at Exhibit 18 before the executing court seeking stay of the execution proceeding in the light of pendency of the aforesaid miscellaneous application filed by the respondent before the appellate court for permission to deposit the costs beyond the stipulated period of time. As noted above, the executing court allowed the said application, as a consequence of which the execution proceeding has been stayed.

9. Learned counsel for the petitioner invited attention of this Court to Order 41 Rule 5 of the Code of Civil Procedure (CPC) to contend that pendency of appeal in itself cannot operate as stay of a decree and in the present case, since the respondent had failed to deposit amount of costs, subject to which the application for condonation of delay in filing the appeal was allowed, as on today, even the appeal filed by the respondent cannot be said to be pending

before the appellate court and that in these circumstances, the application at Exhibit 18, could not have been allowed by the executing court.

10. Perusal of Order 41 Rule 5 of CPC shows that it pertains to stay by the appellate court. It stipulates that appeal shall not operate as stay of proceedings under a decree or order appealed from, except so far as the appellate court may order and it is further specified that a decree shall not be stayed only because an appeal has been preferred.

11. In the present case, since the respondent failed to deposit the amount of costs as a pre-condition for the application for condonation of delay being allowed, as on today, it cannot be said that even the appeal is pending before the appellate court. It is specifically asserted on behalf of the petitioner that the miscellaneous application bearing MJC No. 24/2019, filed by the respondent seeking permission to deposit the costs beyond the stipulated period of time, has not been decided and it is still pending. In these circumstances, due to non compliance of the condition to deposit of costs within stipulated period of time, even the application for

condonation of delay cannot be said to have been allowed by the appellate court. In these circumstances, it cannot be said that appeal filed by the respondent is pending before the appellate court against the decree, of which execution is sought.

12. As noted above, even mere pendency of appeal under Order 41 Rule 5 of the CPC cannot operate as stay of the decree and therefore, it is relevant that executing court in the present case committed grave error in allowing the application at Exhibit 18 and granting stay of the execution proceedings, merely because miscellaneous application filed by the respondent bearing MJC No. 24/2019, for permission to deposit costs beyond stipulated period of time, was still pending before the appellate court. The executing court has clearly committed an error of jurisdiction and wrongly exercised power while allowing the application at Exhibit 18.

13. In view of the above, the present writ petition is allowed and the impugned order dated 23-10-2019, is quashed and set aside.

14. The executing Court shall proceed in accordance with law. It is made clear that the order in the present writ petition shall

not influence the appellate court in deciding MJC No. 24/2019 and passing consequential orders in the matter.

15. Needless to say the aforesaid application bearing MJC No. 24/2019 shall be taken up and decided immediately by the appellate Court.

JUDGE

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