

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.5911 OF 2022**

HANUMANT NARHARI HUGE
VERSUS
DEELIP LIMBAJI BHANDARE DIED THROUGH LRS ROHINI
DEELIP BHANDARE AND OTHERS

...

Mrs. M. A. Kulkarni, Advocate for the Petitioner.

Mr. A. A. Nimbalkar, Advocate for Respondent Nos.1A to 1D.

...

**CORAM : SHARMILA U. DESHMUKH, J.
DATED : 10th JANUARY, 2023.**

PER COURT:-

1. The petition challenges the order dated 12.04.2022 passed in Regular Civil Appeal No.8/2016, whereby the Appellate Court allowed the application filed by the respondents/orig. defendants and granted stay to the judgment and degree passed in Special Civil Suit No.24/2002 till the final disposal of RCA No.8/2016 and RCA No.116/2012.

2. The petitioner had preferred the Special Civil Suit No.24/2002 for recovery of amount of Rs.2,70,000/- before the Civil Judge, Senior Division, Ambajogai, which came to be decreed by judgment and decree dated 14.03.2011. As against the judgment and decree, the respondents preferred a Regular Civil Appeal after a delay of 1460 days, which came to be condoned by order dated 23.11.2015. Subsequently, the respondents preferred an application for stay seeking stay of the judgment and decree dated 14.03.2011, which came to be allowed.

3. Heard the learned counsel appearing for the parties.

4. Learned counsel for the petitioner submits that the decree being a money decree, no stay ought to have been granted without deposit of the decretal amount and the Appellate Court erred in law by granting stay to the judgment and decree.

5. Per contra, learned counsel for the respondents supported the impugned order and submitted that during the trial the orig. defendant no.1 was not granted any opportunity to represent his case and lead evidence and in fact the matter proceeded without written statement of defendant no.1. He would further submit that, the petitioner had filed execution proceedings and if the decree would have been executed, then it would have rendered their appeal infructuous and as such, the order granting stay cannot be faulted with. He would further submit that the respondents have already deposited an amount of Rs.2,00,000/- as per the order of this Court.

6. It is not in dispute that, the decree is a money decree and in case of a money decree the deposit is the rule. The provisions of Sub-Rule (3) of Rule 1 of Order XLI of the Code of Civil Procedure, which deals with the Appeals from original decrees provides that where the appeal is against a decree for payment of money, the appellant shall, within such time as the Appellate Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit. For the purpose of the present issue, what is relevant is, also Rule 5 of Order XLI of the Code of Civil Procedure, which deals with the stay by Appellate Court and in particular Sub-Rule (5) of Rule 5 of Order XLI provides that, notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the

security specified in sub-rule (3) of rule 1, the Court shall not make an order staying the execution of the decree.

7. In my opinion, the Appellate Court has failed to notice the provisions of Order XLI of the Code of Civil Procedure. The provisions of Sub-Rule (3) of Rule 1 of Order XLI indisputably gives an discretion to the Appellate Court to direct deposit of disputed amount, within such time as it thinks fit at the time of filing of the appeal. However, while granting stay of the execution of the decree, the provision of the Sub-Rule 5 of Rule 5 of Order XLI has to be taken into consideration, which has not been considered in the present case. An exceptional case has to be made out for stay of the execution of the money decree. In the present case, there is no finding of the Appellate Court that the stay has been granted for any exceptional reason or that a strong case has been made out for passing of the order of stay of execution of the decree.

8. Having regard to the facts and circumstances of the case that the decree is a money decree and particularly in a case where a stay of the money decree is granted without deposit, the impugned order is not legally sustainable. The Writ Petition deserves to succeed. The impugned order dated 12.04.2022 is hereby modified. The respondents shall deposit the balance decretal amount within a period of six weeks from today, failing which the stay granted by the Appellate Court shall stand vacated.

9. Writ Petition is partly allowed in the above terms.

(SHARMILA U. DESHMUKH)
JUDGE