

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD**

**903 CIVIL APPLICATION NO.12055 OF 2021  
IN SA/263/2021**

M/s. Shiva Enterprises  
Through it's Partner Mr. Dhoopnarayan  
s/o Rajkaran Singh, Age 60 yrs.,  
Occ. Contractorship,  
R/o CIDCO, Aurangabad  
A/P Plot No.F-62, MIDC, Latur.

... **Applicant**

... **Versus** ...

- 1     The Maharashtra Housing and Area  
Development Authority (MHADA),  
Through it's Secretary,  
Mantralaya, Mumbai – 32.
- 2     The Chief Engineer-II,  
MHADA, Kalanagar,  
Bandra (East), Mumbai – 400 051.
- 3     The Deputy Chief Engineer (Works),  
MHADA, Kalanagar,  
Bandra (East), Mumbai – 400 051.
- 4     The Chief Officer,  
Nashik Housing & Area Development  
Board, Nashik, Dist. Nashik.
- 5     The Executive Engineer,  
Nashik Housing & Area Development  
Board, 80 feet road,  
Dhule, Dist. Dhule.

... **Respondents**  
(Original Appellants)

...

Mr. J.N. Singh, Advocate for applicant

Mrs. Renuka V. Ghule, Advocate for appellant Nos.1 to 4 in SA

...

**CORAM : SMT. VIBHA KANKANWADI, J.**

**DATE : 30<sup>th</sup> JUNE, 2023**

**ORDER :**

1 Present Civil Application seeks modification of order dated 03.08.2021 passed in Civil Application No.5675 of 2021 in Second Appeal No.263 of 2021. In order to understand the application better, the prayer clauses are reproduced :

A) This application may kindly be allowed.

B) The Hon'ble Court may be pleased to modify the order dated 03.08.2021 passed in Civil Application No.5675 of 2021 in Second Appeal No.263 of 2021 to the extent staying the execution of decree in the interest of justice.

C) Pass any other order as this Hon'ble Court may deem fit and proper in the peculiar facts and circumstances of the case.

2 Heard learned Advocate Mr. J.N. Singh for the applicant and learned Advocate Mrs. Renuka V. Ghule for appellant Nos.1 to 4 in Second Appeal.

3           It has been submitted on behalf of the applicant that this Court has committed wrong in observing while admitting the Second Appeal and framing the substantial questions of law that earlier the Trial Court has decreed the suit in its entirety; whereas the first Appellate Court has modified it and the amount that is awarded is almost 50% less. In fact it is more than 50%. Further, the observations that certain amount was deposited by the defendants in this Court in view of the order passed by Division Bench of this Court in Civil Application No.5310 of 2014 on 11.07.2014 was not communicated and considered by the learned First Appellate Court. He submits that it was as per the order passed by this Court and after the present respondents (original appellants) the amount has been withdrawn and there is no suppression of fact. He has tried to submit that though there was nothing in the Second Appeal, it has been admitted and, therefore, in view of Section 100(5) of the Code of Civil Procedure he can ask for the modification. The order passed by this Court would be a hurdle in withdrawing the amount and, therefore, he seeks modification.

4           Learned Advocate for the respondents in application and original appellants submits that initially the learned Civil Judge Senior Division had decreed the entire suit. The First Appeal was preferred before this Court, however, in view of the change in the pecuniary jurisdiction the First Appeal

was decided by the District Judge and the original decree then modified. She maintains the submissions those were made at the time of admission of the First Appeal and submits that as on today the original plaintiff has withdrawn amount of Rs.90,99,965/-, which is according to her, more than the decretal amount. She submits that she is ready for the final hearing of the Second Appeal also.

5           At the outset, it is to be noted that this Court cannot sit as an Appellate Court for itself. The Second Appeal was admitted by a speaking order on 03.08.2021. Substantial questions of law have been framed and if the original respondent has any objection for the same, the legal recourse is available. Another fact to be noted is that the present application does not seem to be under Section 100(5) of the Code of Civil Procedure, as in the prayer clause the modification has been sought in respect of order passed to the civil application and not the order i.e. passed in the Second Appeal. The fact that amounts have been deposited and withdrawal has been done under the orders of this Court has also been considered while passing the order dated 03.08.2021 in Civil Application No.5671 of 2021. This Court has categorically mentioned that *“Though this is a money decree and the settled legal position is that the Court should be slow in granting blanket stay to such judgment and decree; yet, here substantial amount appears to have*

*been withdrawn by the plaintiff-respondent after it was deposited with this Court.”* What was considered was that the appellant-MHADA had deposited amount of Rs.35,16,576/- and the decree that has been passed and the principal amount was Rs.37,51,784/-. Therefore, that substantial part was considered and now the statement has been made about withdrawal of the amount of Rs.90,99,965/-. Learned Advocate for the applicant has objection for this figure also, but at this stage, this Court cannot go into that aspect. It will not be out of place to mention here that since the application was for modification of the order, this application has also been placed before the same Judge, who had passed the order on Civil Application No.5675 of 2021. The assignment of the Second Appeal is before another Bench and if it is suitable to that Bench, the parties may seek for the early hearing of the Second Appeal and while dictating this order, now, the learned Advocate for the present applicant is submitting that the Second Appeal is already fixed for final hearing. Under such circumstance, this Court does not feel that the case is made out for modification, when the matter can be decided finally, in short period. Application stands rejected.

**( SMT. VIBHA KANKANWADI, J. )**