

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.10876 OF 2019

Gurunath Babru Padulkar

.... Petitioner

Versus

Khwaja Bapulal Mendke
and another

.... Respondents

.....

Mr. M.B. Kolpe, Advocate for the Petitioner

Mr. Shoyab Shaikh, Advocate for Respondent No.1

.....

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 20th JULY, 2023

ORDER :

1. This petition filed under Article 227 of the Constitution of India, challenges the common order passed by learned Civil Judge, Junior Division, Osmanabad, below Exhibit-36 and 38 in Regular Civil Suit No.242 of 2011.

2. Brief facts are that, respondent No.1/original plaintiff filed Regular Civil Suit No.242 of 2011 for injunction in respect of the suit property. The petitioner was original defendant No.2 in the suit. The suit was decided *ex parte* against the petitioner/defendant No.2. The *ex parte* decision was challenged by the petitioner/defendant No.2 by filing Regular Civil Appeal No.80 of 2016, which was allowed by the Appellate Court. The impugned judgment and decree in

Regular Civil Suit No.242 of 2011 was quashed and set aside, and the matter was remanded back to the Trial Court on condition to deposit costs of Rs.5,000/- on or before 20/10/2018, failing which the decree would stand confirmed.

3. The petitioner/defendant No.2, after remand, filed application Exhibit-31 in the Trial Court contending that, the petitioner/defendant No.2 could not deposit the costs amount on or before 20/10/2018 as he was ailing. In support of this contention, he submitted the medical certificate along with the application, and prayed that costs of Rs.5,000/- be accepted. The said application was allowed by the Trial Court subject to further costs of Rs.1,000/-. The petitioner/defendant No.2, thereafter, filed written statement (Exhibit-33) in the Trial Court. Respondent No.1/original plaintiff, thereafter, filed application Exhibit-36 contending that since the petitioner/defendant No.2 has failed to deposit costs within stipulated time, the decree stood confirmed as per the order passed by the Appellate Court. He also filed application Exhibit-38 for review of the order passed by the Trial Court below Exhibit-31, thereby allowing petitioner/defendant No.2 to deposit amount of cost. By common order, the Trial Court allowed both the applications and confirmed the decree in

Regular Civil Suit No.244 of 2011, in view of the orders passed in Regular Civil Appeal No.80 of 2016 by granting liberty to respondent No.1/original plaintiff to withdraw the amount of Rs.6,000/- deposited by the petitioner/defendant No.2. Hence, the present petition.

4. Heard the learned advocate for the petitioner and the learned advocate for the respondent No.1. Perused the writ petition memo, annexures thereto and the impugned orders.

5. The petitioner/defendant No.2 has committed mistake in approaching the Trial Court seeking extension of time to deposit the amount of costs, in fact, the petitioner/defendant No.2 ought to have approached the Appellate Court, for extension of time as that Court had stipulated time for depositing costs. In these facts, the trial Court is justified in allowing the application for review.

6. However, considering the peculiar facts of the present case, and as the Appellate Court has passed the order in favour of the petitioner/defendant No.2, and quashed and set aside the decree and remanded the matter back to the Trial Court for decision on merits, the petitioner/defendant No.2

needs to be given fair opportunity to contest the suit on merits. In that view of the matter, the writ petition is allowed.

7. Impugned common order dated 11/01/2019 passed by learned Civil Judge, Junior Division, Osmanabad, below Exhibits-36 and 38 in Regular Civil Suit No.242 of 2011 is hereby quashed and set aside.

8. The petitioner/defendant No.1 is directed to pay additional costs of Rs.10,000/- to respondent No.1/original plaintiff in the Trial Court. On payment of said costs, the time granted to the petitioner shall stand extended and the Trial Court shall accept the written statement filed by the petitioner/defendant No.1 and proceed with the trial in accordance with law.

[NITIN B. SURYAWANSHI]
JUDGE