



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

WRIT PETITION NO. 10896 OF 2024

Shobha Shivaji Gore And Another
VERSUS
Manisha Jalindar Kate

Mr. U. U. Wagh, Advocate for Petitioners
Mr. R. K. Bhagat a/w Mr. B. L. Patil, Advocate for Respondent

CORAM : R. M. JOSHI, J.
DATE : 18th March, 2025

PER COURT :-

1. Petitioners are original defendants in Special Civil Suit No. 208/2019 who has filed appeal being Regular Civil Appeal No. 94/2023 against the judgment and decree passed by the Trial Court dated 17.04.2023. In this appeal Application Exhibit 5 came to be filed for seeking stay to the given judgment and decree. Learned First Appellate Court by impugned order dated 18.04.2024 has stayed the impugned judgment and decree passed by the Trial Court subject to condition that the appellants/petitioners herein deposited 25% of the decretal amount to the amount in a Court within a period of a month. It was further directed that decree passed by the Trial Court is kept on the suit property.

2. Learned counsel for petitioners submits that the First Appellate Court has committed error in not considering the evidence led before the Trial Court. It is his argument that the plaintiff has not led any

evidence with regard to the actual payment of Rs. 23,05,000/- to defendants. In this regard from observations made by the Trial Court in Paragraph No. 26 of the judgment, it is his submission that unless the initial burden is discharged by the plaintiff, onus did not shift on the defendants to prove contrary. It is his submission that the Trial Court has committed error to cast burden on defendants to prove the case of the plaintiff. It is submitted that in these facts, the First Appellate Court was not justified in imposing the conditions while granting stay as recorded herein above.

3. Learned counsel for respondent/original plaintiff supported the impugned order. He drew attention of the Court to the pleadings of the parties so also the evidence led before the Trial Court. It is his submission that plaintiff has discharged the initial burden of proving the execution of the agreement Exhibit 43. According to him, once plaintiff discharges the initial burden, onus shifts upon the defendants to prove otherwise. Admittedly, Defendant No. 1 has failed to enter into the witness box to subject herself for cross examination. He also drew attention of the Court to agreement Exhibit 43 with reference of the amount be paid to the defendants in cash.

4. Though the suit is originally for the specific performance of the contract in alternative, the refund of money is sought. The Trial Court refused decree of specific performance however directed refunds of the

money. It is thus money decree. The First Appellate Court in challenge to the said decree and more particularly while staying such money decree is duty bound to impose appropriate conditions. Here, in this case, the First Appellate Court has directed the appellant/petitioners herein to deposit 25% of the decretal amount. In this regard, it is pertinent to note that the plaintiff's contention before the Trial Court with regard to the payment was denied by the defendants. Plaintiff examined himself and has proved the factum of execution agreement Exhibit 43 so also payment of money. Defendant No. 1 did not step in the witness box though other witnesses were examined. The evidence led by Defendant No. 1 prima facie is not sufficient to discharge, onus which has shifted upon the defendants pursuant to the evidence led by the plaintiff. Having regard to these facts, the condition imposed by the First Appellate Court of deposit of 25% amount so also creation of charge over the suit property cannot be faulted with.

5. Thus, this Court finds no merit in the petition. Petition stands dismissed.

6. All observations made herein being prima facie shall not bind the First Appellate Court while deciding the appeal on merit.

(R. M. JOSHI, J.)

bsj