

-ORDER BELOW EXH.15-**(Passed on:-10th day of January, 2020)**

01. By way of present applicant, the respondent has prayed that the appeal be dismissed for non-compliance of Order 41, Rule 1(3) of the Code of Civil Procedure.

02. Learned advocate for the respondent vehemently submitted that appeal has been filed against money decree. Provisions of Order 41, Rule 1(3) of the Code of Civil Procedure mandates, that whenever an appeal is filed challenging money decree the appellant has to deposit the amount disputed in the appeal and furnish security in respect thereof as the court may think fit. Learned advocate for respondent relied on judgment of Hon'ble Bombay High Court in case of **Bhogvati Sahakari Sakhar Karkhana Ltd. -Vs.-M/S. Chaugule and sons, reported in 2003(2) Mh.L.J. 562.** In this case, Hon'ble Bombay High Court has held that if Appellate Court prima facie finds that the case warrants exercise of powers under Order 41, Rule 1(3) of the Code of Civil Procedure, it may at the instance of opposite side or suo motu direct the appellant to deposit decretal amount. He submitted that there is non-compliance of Order 41, Rule 1(3) of the Code of Civil Procedure, therefore, the appeal be dismissed.

03. Opposing the application, learned advocate for appellants vehemently submitted that provisions of Order 41, Rule 1(3) of the

Code of Civil Procedure are not mandatory but are directory in nature. He relied on judgment of Hon'ble Bombay High Court in case of **Prabhakar -Vs.- Vinayakrao, reported in AIR 1983 Bombay 301.** In this case, Hon'ble High Court has held that an appeal can not be said to be untenable on the ground that decretal amount was not deposited in the court. He also relied on the judgment of Hon'ble Apex Court in case of **B. P. Agarwal and another -Vs.-Dhanalakshmi Bank Ltd. and others, reported in AIR 2008 SC 143.** In this case, it is held that non-compliance of Order 41, Rule 1(3) of the Code of Civil Procedure, would not result in dismissal of the appeal. He therefore, prayed that the application be rejected.

04. I have given anxious consideration to submissions made at bar. There is no dispute that the suit was for recovery of money. The appellant had filed application for stay. Subsequently, he endorsed on the said application, it be decided along appeal on merits. In view of that, application for stay is directed to be decided on merit.

05. It is true that provisions of Order 41, Rule 1(3) of the Code of Civil Procedure mandates that appellant shall deposit amount disputed in appellate court or shall furnish such security in respect thereof. However, provisions of Order 41, Rule 5 sub-rule (5) makes it clear that when provisions of sub-rule 3 of Rule 1 of Order 41 are not complied with, court shall not stay execution of decree. In view of this provision, it is clear that unless decretal amount deposited in the court there would not be stay. Thus, for want of deposit of decretal amount decree shall remain in force and open for execution, however, appeal

can not be dismissed for non-compliance of Order 41, Rule 1 sub-rule 3 of the Code of Civil Procedure. This, position is further amplified in provisions of Order 41, Rule 5 sub-rule 1 of the Code of Civil Procedure. The said provision makes it clear that an appeal shall not operate as a stay of proceeding under decree except when the decree is stayed. For aforesaid reasons, I hold that appeal can not be dismissed for want of compliance of provisions of Order 41, Rule 1 sub-rule 3 of the Code of Civil Procedure. If the said provisions are not complied with then there would be not stay to execution of decree. Consequently, I pass following order:-

-ORDER-

01. Application (Exhibit No.15) is rejected.
02. Costs on application.

Date :-10/01/2020.

(Rohan B.Rehpade)
Adhoc District Judge-1,
Buldana.