

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 79 OF 2022

IN

FIRST APPEAL NO. 20 OF 2022

Mohammed Shafi Shaikh Ahmad
Deceased through LRs. ... **Applicant**

IN THE MATTER BETWEEN :

Mohammed Shafi Shaikh Ahmad
Deceased through LRs. ... **Petitioner**

Versus

Preetam Ramchand Chhugani
Deceased through LRs. ... **Respondent**

Mr. Srinivas Bobde a/w. Mr. Sagar Kursija i/b. Dipali Kedar,
Advocate for Applicant.

Mr. Godbole, Advocate a/w. Mr. Vilas B. Tapkir, Advocate for
Respondent.

**CORAM : K. R. SHRIRAM &
RAJESH S. PATIL, JJ**

DATE : JANUARY 24, 2023

PC

1. Interim application is for stay of the impugned judgment dated 16th March 2020.

2. Paragraph Nos. 1 and 2 of the order dated 11th January 2022 reads as under :

“1. Mr. Dani makes a reasonable suggestion. He states that First Appeal itself may be listed for final disposal at an early date at the admission stage. In the meantime, he submits, execution of the decree dated 16th March 2020 be stayed at least to the extent of possession.

2. The decree was also for an amount of Rs. 6 lakhs as mesne profits. The appellant will be required to deposit this amount within six weeks from today. We do not permit withdrawal of the amount at this stage.”

3. On 18th February 2022, the Court directed the Registry to accept the deposit of Rs.6,00,000/- and also put the parties to notice that if the appeal cannot be taken up for final disposal, the Court would consider the grant of an appropriate interim relief.

4. On 24th February 2022, the Court was pleased to pass the following order :

“1. In accordance with our order of 11th January 2022, the Appellant has deposited the amount of Rs.6,00,000/- decreed as mesne profits.

2. Mr. Bobde for the Appellant states that while a private paper book has been filed he has not had time to study it thoroughly yet.

3. In any case, we are unable to take up the matter for final disposal today for want of time and since there are very many matters pending admission on our docket.

4. A question, will, therefore, arise as to what interim order should be fashioned until the final disposal. The finding of the Trial Court is that the Appellant (Original Defendant) is a trespasser. He is in possession of a large plot of about 640 sq.mtrs. at Sindh Society, Aundh, Pune. This is undoubtedly a prime area. There is a ground and one upper floor structure on that plot, also in possession of the Appellant.

5. Rather than select some ad hoc number we will let both sides obtain respective valuation

reports. For this purpose, we direct the Appellants to permit the Respondents, their Advocates and their valuers to enter upon the property for the limited purpose of inspection. This is to be done after 48 hours' prior notice to Mr. Bobde's Attorneys. These reports will then be then placed before the Court.

6.Liberty to both sides to apply for a listing thereafter.

7. Previous interim order to continue.

8.All concerned will act on production of a digitally signed copy of this order.”

5. Pursuant to this order, both appellant and respondent have placed on record their respective valuation reports. Respondent has placed a valuation report dated 10th March 2022 of one Kailash B. Gadage, Government Registered Valuers and Chartered Engineers. This is an extensive report and the valuer has suggested that the rent per month as per the market value would be Rs.5,16,600/- and as per the ready reckoner Rs.1,47,350/-.

6. Appellant has placed on record a valuation report dated 2nd May 2022 by Architect Sanjeev Bhosale in the name and style SPOT Consultants, Architect, Interior Designer & Government Registered Valuer. In the report dated 2nd May 2022, he has only given a finding on the appropriate rent for the building on the 604 Sq.Mtrs. plot of land and stated that the ideal rent for the building would be about Rs.8,000/- to 9,000/- per month. We have to observe that this valuation report has been filed despite the party being aware that the Court was looking for

valuation of the larger plot of land itself. We say this in view of paragraph 4 of the order dated 24th February 2022, where the Court has observed that appellant is in possession of 'large plot of land about 640 Sq.Mtrs. (which should be 604 Sq.Mtrs.)' at Sindh Society, Aundh, Pune which is undoubtedly a prime area. The Court has also observed that there is ground and one upper floor structure 'on that plot' also in possession of the appellant. Therefore, the Court has very clearly observed that appellant being in possession of the large plot of land along with structure thereon should be granted protection to continue to have possession pending the disposal of appeal and appellant needs a stay.

7. Therefore, we reject the valuation report submitted by appellant. Considering the valuation report of Kailash B. Gadage relied upon by respondents, we would fix a monthly compensation of Rs.3,50,000/-. We have taken the average of rent suggested as per the market value and the rent suggested as per the ready recokner value for 2021-22. This amount shall become payable from the date of the decree, i.e., 16th March 2020 in which appellant has been declared as a trespasser. The compensation payable up to 15th January 2023 will be 1,19,00,000/- (Rs.3,50,000/- x 34 months). From 16th January 2023 until the hearing and final disposal of the this appeal, the appellant shall pay the same amount of Rs.3,50,000/- per month and this amount shall be paid on the 20th of every

month in advance. This would mean for the period 16th January 2023 to 15th February 2023, an amount of Rs.3,50,000/- has already become due and payable. Therefore, a total of Rs.1,19,00,000/- + 3,50,000/- (Rs.1,22,50,000/-) for the period upto 15th February 2023 is payable and this amount shall be paid within four weeks from today. Thereafter, an amount of Rs.3,50,000/- per month or part thereof shall be paid by appellant on 20th of every month in advance. The amounts shall be deposited with the Registrar, Appellate Side. If there is any default, the stay will stand vacated without any further notice and appeal itself will get dismissed without further reference to the Court.

8. The amount deposited above shall be invested by the Registrar, Appellate Side in a Nationalized Bank for an initial period of 13 months to be renewed year to year until further orders. If the appeal is not disposed within one year from today, the compensation payable will be increased by 10% per month.

9. It will be apposite to reproduce paragraphs 8 to 10 and 12 to 18 of an order dated 25th February 2015 of this Court in Civil Application No. 1092 of 2013 in Writ Petition No. 2748 of 2004 – Mr. Dinshah Jal Daruwala & Ors. v. M/s. Impex (India) Limited. It reads as under :

“8. Even in the present case, by the order passed on 27.4.2004, during the pendency of this writ petition under Article 227 of the Constitution of India, the petitioners have been allowed to continue to remain in occupation of the premises. The petitioners have also remained in

occupation of the premises by paying an amount equivalent only to the contractual rate of rent i.e., Rs.375/-. Therefore, in my view, the situation in the present case is also similar to the case of Atmaram Properties (supra). If one reads the judgment in Atmaram properties (supra), the appellate authority while exercising its jurisdiction under Order 41 Rule 5 of the Code of Civil Procedure, 1908, put the respondent/tenant on terms because the respondent/tenant who had suffered an order of eviction must comply and vacate the premises. Though the respondent/tenant had a right of appeal statutorily his prayer for grant of stay has been dealt with in exercise of equitable discretionary jurisdiction of the appellate authority.

9. Mere preferring of an appeal does not operate as stay on the decree or order appealed against nor on the proceedings in the court below. A prayer for the grant of stay of proceedings or on the execution of decree or order appealed against has to be specifically made and the court has discretion to grant an order of stay or to refuse the same. The principal consideration which prevails with the court is that in spite of the appeal or writ having been entertained for hearing by the court, the appellant or petitioner may not be deprived of the fruits of his success in the event of the appeal or petition being allowed. This consideration is pitted and weighed against the other paramount consideration: why should a party having succeeded from the court below be deprived of the fruits of the decree or order in his hands merely because the defeated party has chosen to invoke the jurisdiction of a superior forum ?

10. Though the power exercised by this court under Article 227 of the Constitution of India is basically supervisory in nature, the grant of stay of the order of the appellate authority is dealt with by this court in exercise of its equitable discretionary jurisdiction. While exercising its equitable discretionary jurisdiction, this court is certainly entitled to and has the powers to impose conditions. Dispossession, during the pendency of an appeal of a party in possession, is generally considered to be "substantial loss" to the party applying for stay of execution. The power to grant stay is discretionary and flows from the jurisdiction conferred on court which is equitable in nature. To secure an order of stay merely by preferring an appeal is not a statutory right conferred on the appellant. So also, court is not ordained to grant an order of stay merely because an appeal has been preferred and an application for an order of stay has been made. Therefore, an applicant for order of stay must do equity for seeking equity. Thus, for example, though a decree for payment of money is not ordinarily stayed by the appellate court, yet,

if it exercises its jurisdiction to grant stay in an exceptional case it may direct the appellant to make payment of the decretal amount with interest as a condition precedent to the grant of stay, though the decree under appeal does not make provision for payment of interest by the judgment-debtor to the decree-holder. Robust common sense, common knowledge of human affairs and events gained by judicial experience and judicially noticeable facts, over and above the material available on record-all these provide useful inputs as relevant facts for exercise of discretion while passing an order and formulating the terms to put the parties on.

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12. Keeping all these realities in mind, the Apex Court in *Atmaram Properties* case (supra) has in paragraphs 4, 18 & 19 has held as under :

“4. Ordinarily this Court does not interfere with discretionary orders, more so when they are of interim nature, passed by the High Court or subordinate Courts/Tribunals. However, this appeal raises an issue of frequent recurrence and, therefore, we have heard the learned counsel for the parties at length. Landlord-tenant litigation constitutes a large chunk of litigation pending in the Courts and Tribunals. The litigation goes on for unreasonable length of time and the tenants in possession of the premises do not miss any opportunity of filing appeals or revisions so long as they can thereby afford to perpetuate the life of litigation and continue in occupation of the premises. If the plea raised by the learned senior counsel for the respondent was to be accepted, the tenant, in spite of having lost at the end, does not lose anything and rather stands to gain as he has enjoyed the use and occupation of the premises, earned as well a lot from the premises if they are non-residential in nature and all that he is held liable to pay is damages for use and occupation at the same rate at which he would have paid even otherwise by way of rent and a little amount of costs which is generally insignificant.

The appellate court while exercising jurisdiction under Order 41 Rule 5 of the Code did have power to put the appellant tenant on terms. The tenant having suffered an order for eviction must comply and vacate the premises. His right of appeal is statutory but his prayer for grant of stay is dealt with in exercise of equitable discretionary jurisdiction of the appellate court. While ordering stay the appellate court has to be alive to the fact that it is depriving the successful landlord of the fruits of the decree and is postponing the execution of the order for eviction. There is every justification for the appellate court to

put the appellant tenant on terms and direct the appellant to compensate the landlord by payment of a reasonable amount which is not necessarily the same as the contractual rate of rent.

18. That apart, it is to be noted that the appellate Court while exercising jurisdiction under Order 41 Rule 5 of the Code did have power to put the tenant-appellant on terms. The tenant having suffered an order for eviction must comply and vacate the premises. His right of appeal is statutory but his prayer for grant of stay is dealt with in exercise of equitable discretionary jurisdiction of the appellate Court. While ordering stay the appellate Court has to be alive to the fact that it is depriving the successful landlord of the fruits of the decree and is postponing the execution of the order for eviction. There is every justification for the appellate Court to put the tenant-appellant on terms and direct the appellant to compensate the landlord by payment of a reasonable amount which is not necessarily the same as the contractual rate of rent. In *Marshall Sons & Co. (I) Ltd. Vs. Sahi Oretrans (P) Ltd. & Anr.*, (1999) 2 SCC 325, this Court has held that once a decree for possession has been passed and execution is delayed depriving the judgment-creditor of the fruits of decree, it is necessary for the Court to pass appropriate orders so that reasonable mesne profits which may be equivalent to the market rent is paid by a person who is holding over the property.

19. To sum up, our conclusions are:

(1) while passing an order of stay under Rule 5 of Order 41 of the Code of Civil Procedure, 1908, the appellate Court does have jurisdiction to put the applicant on such reasonable terms as would in its opinion reasonably compensate the decree-holder for loss occasioned by delay in execution of decree by the grant of stay order, in the event of the appeal being dismissed and in so far as those proceedings are concerned. Such terms, needless to say, shall be reasonable;

(2) in case of premises governed by the provisions of the Delhi Rent Control Act, 1958, in view of the definition of tenant contained in clause (1) of Section 2 of the Act, the tenancy does not stand terminated merely by its termination under the general law; it terminates with the passing of the decree for eviction. With effect from that date, the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises

and earn rent if the tenant would have vacated the premises. The landlord is not bound by the contractual rate of rent effective for the period preceding the date of the decree; (3).....”

13. In this case also the litigation has gone on for a very long period. The original suit was filed sometime in September-1998 and the trial court decreed the suit on 13.6.2001. The appeal filed by the petitioners came to be dismissed on 23.1.2004. On 27.4.2004 rule was issued and made returnable early with liberty to apply for a fixed date of hearing. The present Civil Application itself has been filed in March-2013. We are in February-2015. When litigation like this go on for such a length of time, the tenants like the petitioners continue in occupation of the premises and if they lose in the end, do not lose anything. On the contrary they stand to gain having enjoyed the use and occupation of the premises almost for free. They would have also earned lot from the premises if they are non-residential in nature and all that they will be liable to pay for use and occupation by way of damages is the same rate which they would have even otherwise paid by way of rent. The Apex Court has also held that once a decree for possession has been passed and execution is delayed depriving the landlord of the fruits of decree, it is necessary for the courts to pass appropriate orders so that reasonable compensation to the decree-holder for loss/delay in execution of the decree by the grant of stay order has to be paid.

14. In the circumstances, I hold that the respondents are entitled to be reasonably compensated.

15. The valuation report relied upon by the respondents is issued in April-2008, i.e., almost 7 years ago. The petitioners however, deny the basis for calculation. The property is land plus existing residential heritage Bungalow, out houses and garden on plot area of 5289.30 sq. mtrs. which is approximately about 57000 sq. ft. (1 sq. mtr. = 10,763 sq. feet) which is about 1.31 acres. The property also has out houses, servant's quarters, W.C and bath for servants, garage, bore well etc. Koregaon park is a high class affluent area.

16. The valuation report issued on 17.4.2008 suggests that mesne profits as compensation can be anywhere between Rs.16,00,000/- to Rs.16,50,000/- per month. Though property prices would have gone up in the last 6 to 7 years, in my view, taking into account the description of the property and location etc. 35% of the amount that was indicated in April-2008, rounded off to Rs.6,00,000/, would be a reasonable compensation per month.

17. The petitioners are therefore, directed to pay sum of Rs.6,00,000/- per month as compensation from May-2004 until February 2015 i.e., for 118 months within two months either lumpsum or in four installments and continue to pay the same for every successive month on or before 5th day of the month until disposal of the present petition. The amount to be deposited with the Registry and the Registry shall invest the amount with a nationalized bank. The monthly installment to be invested every month on or before 21st of that month.

18. By this order no prejudice would be caused to the petitioners as well in as much as if the petitioners ultimately succeed, the petitioners will be entitled to return of the money with whatever interest is earned."

10. Subject to paying the above amounts, appeal be listed for final hearing on **2nd March 2023**.

(RAJESH S. PATIL, J.)

(K. R. SHRIRAM, J.)

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