

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.1092 OF 2013

IN

WRIT PETITION NO.2748 OF 2004

Mr.Dinshah Jal Daruwala & Ors.)...Applicants/org.respondents

V/s.

M/s.Impex (India) Limited)...Respondents/org.petitioners

Mr.D.J.Khambata Sr.Advocate i/by Mr.M.S.Karnik for applicants.

Mr.Virag Tulzapurkar Sr. Advocate i/by M/s.Vigil Juris for respondents.

CORAM: K.R.SHRIRAM, J.**DATED : 25th February 2015.****P.C. :**

1 This Civil application is filed by the respondents to modify an order dated 27.4.2004 thereby directing the respondents to pay mesne profits or compensation for use and occupation of the suit premises in the sum of Rs.16,21,300/- per month from 4.9.1998 till date and continue to pay at the same rate regularly till the decision of the present petition.

2 The respondents who were the original plaintiffs in the trial court are the owners of a bungalow known as 'Gardenia' in Koregaon Park, Pune. The petitioners who were the original defendants are the tenants in respect of the suit premises. The

respondents had filed an eviction suit in the Small Causes Court, Pune on the ground of nuisance, non-user, un-authorized permanent construction, trespass and breach of tenancy. The suit was decreed by a judgment on 13.1.2001 and the petitioners were directed to hand over the suit premises to the respondents within two months. The petitioners challenged the decree in the District Court at Pune. The respondents also filed their cross-objection. The Additional District Judge, Pune by his judgment and order dated 23.1.2004 dismissed the appeal and granted two months time to the petitioners to hand over possession of the suit premises to the respondents. At the same time, the cross-objection was also dismissed.

3 Being aggrieved by the judgment and decree of the appellate court the petitioners have approached this court by way of this writ petition. At the stage of admission, this court by an order dated 27.4.2004 was pleased to issue rule made returnable early and grant interim reliefs prayed for. The petitioners have been continuing to occupy the suit premises since then. I am told the rent paid is only about Rs.375/- per month. Though about 11 years has passed since then, the petition still remains pending. That is the sad part of such litigation.

It is the case of the applicant/respondent that the petitioners despite suffering a decree of eviction passed by the trial court and confirmed by the appellate court are enjoying the premises taking advantage of the delay in the courts' disposal of such matters.

4 The respondents had filed a Civil Application earlier for payment of mesne profits which was withdrawn on 8.11.2011 with liberty to file appropriate application which was granted. It is stated in the application that a suggestion, at the time of hearing of the Civil Application, came up that the appropriate course for the respondents is to apply for modification of the order dated 27.4.2004.

 The respondents thereafter filed a Civil Application bearing No.890 of 2012 for modification of the order dated 27.4.2004 and prayed for mesne profits. When the Civil Application came up for orders on 31.3.2012, as the request of the respondents to fix the petition for final hearing within 8 weeks was accepted by the court, the Civil Application was withdrawn.

5 In view of the heavy pendency of matters, the petition did not come up for final hearing within 8 weeks of 31.3.2012 and therefore, in March-2013 the respondents took out the present application again. The basis for the prayers sought is that the matter has been pending for many years and the petitioners have been enjoying the premises by paying only the contractual rent of Rs.375/- per month whereas the property is very huge and situated in a prime locality in Pune and as per the Valuation report issued on 17.4.2008, the property should fetch mesne profits of atleast Rs.16,21,300/- per month.

6 The petitioners have opposed the application primarily on the ground that in the suit that was filed by the respondents, the

respondents had sought a decree for mesne profits which was not granted. The respondents have only succeeded in getting a decree for eviction. The respondents having suffered the non grant of decree for mesne profits and having not challenged the same before the appellate court either by filing an appeal in that regard or even in their cross-objection in the appellate court, the respondents cannot ask for mesne profits in the petition filed under Article 227 of the Constitution of India by the petitioners.

The counsel for the petitioners also stated that this court while staying the order of the appellate court has not imposed any condition for grant of stay.

The counsel also submitted that the trial court not having granted the prayer for mesne profits, that relief should be deemed to have been refused and the respondents not going up in appeal against that decision, cannot claim such a relief in this Writ petition. To buttress this point, the counsel for the petitioners relied upon the judgment of the Apex Court in the matter of ¹Mysore State Road Transport Corporation Vs. Babaian Conductor & Anr. The counsel also submitted that if this writ petition is dismissed, the respondents would get only possession of the suit property and nothing more.

Mr.Tulzapurkar also relied upon the judgment of the Full Bench of the Madras High Court in the matter of ²Babburu Basavayya Vs. Babburu Guravayya and submitted that the trial court while decreeing the suit for eviction could have given directions to inquire

¹ AIR 1977 SUPREME COURT 1112

² C.R.P. No.1695 of 1948

into future mesne profits. If that had been given, the suit or that part of the suit relating to future mesne profits would have continued if the decree holder could have moved the court to hold an inquiry and pass a final decree awarding such profits. Therefore, where a decree awarding possession is silent with regard to an inquiry into future mesne profits and the suit is completely disposed of, the respondents cannot apply for mesne profits. Mr.Tulzapurkar also relied upon a judgment of the Patna High Court in the matter of ¹Raghu Mahton Vs. Bulak mahton & ors. on this point. I do not agree with the submissions of Mr.Tulzapurkar for the following reasons.

7 It is true that the trial court has not granted the relief sought under prayer clause-(b) in the suit, i.e., a claim for mesne profits under Order 20 Rule 12(c) of the Code of Civil Procedure 1908 from the date of the suit till possession is realized. But at the same time, the trial court had directed the petitioners to hand over possession within two months. Even the appeal court had directed the petitioners to hand over possession within two months from 13.6.2012. Does that mean that the petitioners will continue to enjoy the property after having suffered two concurrent findings against them and an eviction decree against them by paying a measly amount of Rs.375/- ? Can a party who has suffered an eviction decree and two concurrent findings, be allowed to stay taking advantage of the unreasonable length of time that litigation remains pending in our courts without paying ? Can a party who has suffered

1 AIR 1953 PATNA 289

decree of eviction and two concurrent findings against them, continue to occupy the suit property practically for free and then when the petition is dismissed, expect the landlord to file a separate suit for recovery of damages ?

All these points came up before the Apex Court in the matter of ¹Atma Ram Properties (P) Ltd. Vs. Federal Motors (P) Ltd. In that case the appellant/landlord had initiated proceedings for eviction of the tenant/respondent which was decreed in favour of the appellant. The appellant preferred an appeal against the said order and while staying the eviction order the appellate authority directed the tenant/respondent to deposit Rs.15,000/- per month in court in addition to the contractual rent. The respondent/tenant challenged the order of the appellate authority by filing petition under Article 227 of the Constitution of India directing the condition of depositing Rs.15,000/- per month imposed by the appellate authority. The single Judge of the High Court allowed the petition and set aside the condition imposed by the appellate authority. The effect of the said order of the High Court was that during the pendency of appeal before the appellate authority the respondents would continue to remain in occupation of the premises subject to payment of an amount equivalent to the contractual rent. Feeling aggrieved, the landlord/appellant filed the appeal. The questions that arose on appeal before the Supreme Court were :-

“ (i) in respect of premises enjoying the protection of rent control legislation, when does the tenancy

1 (2005) 1 Supreme Court Cases 705

terminate ? and

(ii) up to what point of time is the tenant liable to pay rent at the contractual rate and when does he become liable to pay compensation for use and occupation of the tenancy premises unbound by the contractual rate of rent to the landlord ?”

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.

11 In the order of 27.4.2004, there is no reference to any demand for mesne profits or compensation pending disposal of the petition by the respondents as condition of stay but at the same time, paragraph-2 of the said order is necessary to be quoted and it reads as under :-

“2. Some contentious questions are involved in the writ petition which, in my opinion, require consideration.

Hence, Rule. Returnable early.

Liberty to the parties to apply for a fixed date of hearing after the ensuing vacation.”

(emphasis supplied)

This gives a feeling that the court in view of having made the rule returnable early and the liberty granted to apply for fixed date of hearing after the vacation, felt all these points could be gone into at the time of hearing of the petition. Unfortunately, the petition never came up for hearing. Does that mean the respondent should be shut out from or deprived of the fruits of his success/decreed in his hands and two concurrent findings in his favour merely because of the traditional lengthy longevity of the litigation ? In my view the answer is in the negative. It will be unjust to shut the door or deprive.

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 (l) 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 lump sum 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.

19 The Civil Application accordingly, disposed.

(K.R.SHRIRAM,J)

20 The counsel for the petitioners requested for stay. Stay rejected particularly in view of the fact that the petitioners have been given two months to comply with the order of this court.

(K.R.SHRIRAM, J.)