

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7970 OF 2014

State of Madhya Pradesh
by its Constituted Attorney
Mr. K.D. Menon, General Manager .. Petitioner
vs.
Mrs. Jainab Abbas Warawala .. Respondent

Mr. Yogesh Naidu a/w. Mr. Rupesh Bobade for the Petitioner.
Mr. Shehzad Rasiwala i/b Mr. P.S. Patil for Respondent.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 21 August 2015.
Date of Pronouncing the Judgment : 25 August 2015.

JUDGMENT :-

1] This petition is directed against the orders dated 18 March 2014 and 8 May 2014 urging the dismissal of respondent's Appeal No. 76 of 2012 on the ground of non-compliance by the respondent with the conditions imposed in the order dated 21 November 2012, *inter alia*, in the matter of deposit of arrears and reasonable compensation in the context of stay upon the execution of eviction decree in R.A.E. & R. Suit No. 37/107 of 1991.

2] The petitioner is the landlord and the respondent is the tenant in respect of the suit premises. The Small Causes Court (Trial Court), by the judgment and decree dated 9 May 2012, directed the

eviction of the respondent from the suit premises. On 8 August 2012, the respondent instituted Appeal No. 76 of 2012 before the Division Bench of the Small Causes Court (Appeal Court) and also applied for stay upon the execution of the decree dated 9 May 2012. The Appeal Court, by its order dated 21 November 2012 granted stay to the execution of the decree dated 9 May 2012 subject to certain conditions with regard to deposit of arrears as well as reasonable compensation in terms of law laid down by the Apex Court in case of ***Atma Ram Properties (Private) Limited Vs. Federal Motors Private Limited***¹. The operative portion of the order dated 21 November 2012, by which the respondent's application at Exhibit-7, for stay upon execution of the decree dated 9 May 2012 was allowed, reads thus:

ORDER

1. Application is allowed.
2. The Decree and Order passed by the trial Court in R.A.E. & R. Suit No. 37/107 of 1991 is hereby stayed till final disposal of the appeal on following conditions.
 - i) *The appellant shall deposit the compensation in the Court at the rate of Rs. 2,35,333/- from the date of decree till final disposal the appeal.*
 - ii) *The arrears of the compensation from the date of decree till this month i.e. till November 2012 shall be deposited (within one month from the date of this order.*
 - iii) *The appellant is further directed to go on depositing the compensation at the same rate*

1 2005(1) SCC 705

- on or before 10th day of each month. The appellant is further directed not to part with possession of the suit premises and not to create third party interest therein till final disposal of the appeal.*
- iv) The respondent is directed to withdraw the amount equal to contractual rent.*
 - v) The appellant is further directed to deposit the entire arrears of the rent so far are due till the date of decree within one month from this order and respondent is entitled to withdraw the same.*
 - vi) The amount of compensation after deducting contractual rent be deposited in the Fixed Deposit Scheme of any Nationalized Bank for appropriate period.*
 - v) The hearing of the appeal is expedited.*

3] The respondent instituted Writ Petition No. 11670 of 2012 mainly to question the condition with regard to deposit of reasonable compensation at the rate of Rs.2,35, 333/- per month in the order dated 21 November 2012. This Court, by order dated 24 January 2013, reduced the amount of compensation to Rs.75,000/- per month. On 23 September 2013, the Special Leave Petition instituted by the petitioner herein against this Court's order dated 24 January 2013 was allowed and compensation as determined by the Appeal Court in its order dated 21 November 2012 was restored. The Review Petition instituted by the respondent was rejected by the Apex Court on 8 January 2014.

4] As there was default on the part of the respondent in complying with the condition for deposit of compensation at the rate of Rs.2,35,333/- per month, the Appeal Court by order dated 16 January 2014, ordered the execution of decree of eviction dated 9 May 2012. On 14 February 2014, the respondent purported to question the warrant of possession before the Trial Court, without much success. Ultimately, on 28 February 2014, the possession of the suit premises came to be delivered by the respondent to the petitioner.

5] The petitioner, on 25 February 2014, filed an application at Exhibit-25 before the Appeal Court purporting to invoke powers under Order 39 Rule 11 of Code of Civil Procedure, 1908 (CPC) seeking *inter alia*, following reliefs:

- (a) *that the necessary direction may kindly be issued to the Appellant/ Defendant to deposit Rs. Rs.38,46,681/- the amount of Compensation due and payable.*
- (b) *That if the Appellant/ Defendant fails to deposit the amount of Rs. Rs.38,46,681/- within the time stipulated by this Hon'ble Court till this Hon'ble Court be pleased to stay the present Appeal.*
- (c) *this Hon'ble court suo-moto pleased to issue Contment against Appellant/Defendant due to violation of order dated 21.11.2012.*
- (d) *any other relief may be granted in the nature and circumstances of the case,*
- (e) *Cost of this Application may be provided for,*

6] The Appeal Court, by order dated 18 March 2014, has rejected the petitioner's application at Exhibit-25. The petitioner's review against the order dated 18 March 2014 was rejected by the Appeal Court on 8 May 2014. Hence, the present petition.

7] Mr. Naidu, the learned counsel for the petitioner, submitted that in the light of the special provisions contained in Order 39 Rule 11(a) of the CPC, as applicable to the State of Maharashtra and in view of admitted defaults on the part of the respondent in depositing the amount of reasonable compensation as directed by the Appeal Court in its order dated 21 November 2012, the Appeal Court ought to have either dismissed the respondent's Appeal No. 76 of 2012 or in any case, stayed the hearing therein, until the respondent complies with the condition of deposit of reasonable compensation. Mr. Naidu submitted that if, even after dismissal of the appeal, the respondent were to comply with the condition for deposit of reasonable compensation, the Appeal Court in exercise of powers conferred upon it by sub-Rule 2 of Order 39 Rule 11 of the CPC, can restore the appeal and proceed to hear the same on its own merits. Mr. Naidu conceded that the power conferred under Order 39 Rule 11 of the CPC need not to be mandatorily exercised in every case of

breach or disobedience, but submitted that in the present case since the breach on the part of the respondent is both willful and contumacious, the Appeal Court failed to exercise the jurisdiction vested in it, by refusing to dismiss the respondent's appeal or at least stay any further hearing in the same, until the respondent complies with the directions for deposit of reasonable compensation.

8] Mr. Naidu, placed reliance upon the following decisions of which, according to Mr. Naidu, support his aforesaid contention.

- (i) *Ramavatar S. Modi Vs. Mulchand S. Modi*² ;
- (ii) *Atma Ram Properties (Private) Limited Vs. Federal Motors Private Limited*³;
- (iii) *Vanmala w/o. Maroti Hatkar Vs. Maroti S. Hatkar*⁴;
- (iv) *Neeta S. Joshi Vs. Shreyas S. Joshi*⁵;
- (v) *Himachal Road Transport Corporation Shimla Vs. Sushila Devi*⁶;
- (vi) *Achal Misra Vs. Rama Shanker Singh & ors*⁷; and
- (vii) *C.Raghunatha Reddy Vs. S. Rajasekaran & P. Devendran*⁸ .

9] The right to institute an appeal against the eviction order before the Division Bench of the Small Causes Court is a right guaranteed by Section 34 of the Maharashtra Rent Control Act, 1999

2 2004(2)Mh.L.J. 1

3 2005(1) SCC 705

4 1992(2) Mh.L.J. 297

5 AIR 1999 Guj 251

6 AIR 1986 H.P. 78

7 2005(2) SCR 439

8 2011(5) CTC 837

(Rent Act). Section 34(1) of the Rent Act provides that notwithstanding anything contained in any law for the time being in force, an appeal shall lie, in Brihan Mumbai, from a decree or order made by the Court of Small Causes, Mumbai, exercising jurisdiction under Section 33, to a bench of two Judges of the said Court which shall not include the Judge who made such decree or order. Sub-section 3 of Section 34, however, provides that no further appeal shall lie against any decision to in appeal under sub-section (1) of Section 34 of the Rent Act. Thus, against any order made by the Court of Small Causes exercising jurisdiction under Section 33 of the Rent Act, there is only one appeal provided to the Bench of two Judges of the Small Causes Court. The question which therefore arises is whether such right of appeal can be denied or in any case, postponed until the appellant complies with conditions imposed in the order staying the execution of the impugned eviction decree or whether, breach of such condition operates, merely to the vacation of the stay on the execution of the impugned eviction decree. In none of the decisions relied upon by Mr. Naidu, was such issue squarely involved and consequently none of the decisions upon which reliance is placed by Mr. Naidu can be said to be authorities in support of the proposition advanced by Mr. Naidu in this petition.

10] In case of *Ramavatar Modi (supra)*, the Division Bench of this Court has held that the provisions of Order 39 Rule 11(1) of Code of Civil Procedure, 1908 (CPC) are not mandatory, but directory. In case of *Atma Ram Properties (P) Ltd. (supra)*, at para 18, the Apex Court has in fact held that the right of the tenant to prefer an appeal against the decree of eviction is a statutory right, but his prayer for grant of stay is dealt with in exercise of equitable discretionary jurisdiction of the Appellate Court, therefore, whilst ordering stay, it is necessary that the Appellate Court imposes conditions as to deposit of reasonable compensation, which is not necessarily the same as contractual rate of rent. This decision, clearly makes a distinction between statutory right of appeal and discretionary relief of stay on execution of the eviction decree pending such appeal. *Atma Ram (supra)*, is not an authority for the proposition that right of appeal itself, should be denied or postponed until the condition for deposit of reasonable compensation is complied with by the tenant. If such condition is breached, no doubt, the stay will stand vacated and the landlord will be entitled to execute the decree of eviction.

11] In case of *Vanmala Hatkar (supra)*, the matrimonial proceedings were stayed until the erring party honours the order for

interim alimony. *Sambhav Tirth Cooperative Housing Society (supra)* is an authority for the proposition that order 39 Rule 11 of CPC does not require the issue of notice to a defaulting party, where defiance is clear on the face of record. In case of *Neeta Joshi (supra)*, the learned Single Judge of the Gujrat High Court has held that the matrimonial Court can stay the proceedings for restitution of conjugal rights, in case of non-compliance with directions for payment of maintenance. In case of *Achal Misra (supra)*, in the context of striking off defence for failure to deposit arrears of rent, the Apex Court issued certain directions to the tenants to deposit the rents pending suit for eviction and further directed that any tenant who does not comply with the order of deposit, shall not be entitled to contest in the proceedings or be entitled to be heard. In case of *C.Raghunatha Reddy (supra)*, the learned Single Judge of the Madras High Court has made some observations with regard to obligation on the part of the tenant to pay the fair rent determined, in the course of Rent Act proceedings.

12] None of the aforesaid judgments, however, are authorities for the proposition advanced by Mr. Naidu in the present case. It is to be noted that the orders made in matrimonial proceedings, particularly

for enforcement of alimony or maintenance orders, really cannot afford any parallel to the situation, which arises in the present case. Similarly, there are specific statutory provisions in rent legislations, which require a tenant to deposit rents as a pre-condition for contesting the proceedings. It is in the context of such statutory provision orders are made for striking off defence, where there is non-compliance with the statutory requirement of deposits of rents in pending proceedings. There is, however, no provision under the Rent Act, which requires deposit of reasonable compensation as a pre-condition for the very entertainment of the appeal against the decree of eviction. Accordingly, the decisions relied upon by Mr.Naidu cannot be regarded as authorities in support of the proposition canvassed by him.

13] In fact, in case of *Himachal Road Transport Corporation, Shimla (supra)*, the Division Bench of Himachal Pradesh High Court has, in terms, held that the Appeal Court has no power to reject the memorandum of appeal or to consign the appeal to the record room for non-compliance with an order made under Sub-rule 3 of Rule 1 of Order 41, in the matter of deposit of decreetal amount or furnish of security proportionate to the decreetal amount. No doubt, the

Division Bench has also observed that if the Court is satisfied on the facts and circumstances of the case that disobedience to the order under Order 41 Rule 1 of CPC is willful, the appellant may be guilty of civil contempt within the meaning of Contempt of Courts Act, 1971 and he will liable to be dealt with under the provisions of the said Act. That is, however, not the issue raised in the present case. In any case, in the present case, the Appeal Court had made no direction for deposit of any amount in the exercise of powers under Order 41 Rule 1(3) of CPC for the deposit of any amount as a pre-condition for entertainment of the appeal itself.

14] In contrast, there are several decisions of the Apex Court itself, which take the view that stay for execution of a decree can be vacated where there is non-compliance with the conditions imposed for grant of stay, however, the Court cannot dismiss the appeal itself. In case of *Kayamuddin Shamsuddin Khan vs. State Bank of India*⁹, this Court had directed the appellant to deposit Rs.75000/- within two weeks, failing which the appeal itself was to stand dismissed without reference to the Court. The Apex Court, after taking cognizance of the provisions contained in Order 41 Rule 1(3) of the CPC as amended in the State of Maharashtra, has held that

9 (1998) 8 SCC 676

the Court can dismiss the application for stay of the execution of the decree, but not the appeal itself. The relevant observations are contained in paragraphs 5 to 8, which read thus:

“5. The question which arises for consideration in this appeal is whether the High Court was justified in directing that the appeal shall stand dismissed without reference to the court in the event of failure on the part of the appellant to deposit Rs 75,000 within two weeks.

6. The learned counsel for the respondent has invited our attention to sub-rule (3) of Rule 1 of Order XLI in the Code of Civil Procedure, as amended in the State of Maharashtra, which reads as under:

“(3) Where the appeal is against a decree for payment of money, the appellant shall, within such time as the Appellate Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit:

Provided that the Court may dispense with the deposit or security where it deems fit to do so for sufficient cause.”

7. The submission of the learned counsel for the respondent is that the High Court was right in giving the direction regarding the deposit of Rs 75,000 as per the aforesaid provision and since the appellant has failed to comply with the same the appeal has been rightly directed to be dismissed. We, however, find that the only consequence for non-compliance with the direction given under sub-rule (3) of Rule 1 of Order XLI is as provided in sub-rule (5) of Rule 5 of Order XLI which reads as under:

“(5) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of Rule 1, the Court shall not make an order staying the execution of the decree.”

8. This would mean that non-compliance with the direction given regarding deposit under sub-rule (3) of Rule 1

of Order XLI would result in the Court refusing to stay the execution of the decree. In other words, the application for stay of the execution of the decree could be dismissed for such non-compliance but the Court could not give a direction for the dismissal of the appeal itself for such non-compliance.”

15] Similarly, in case of ***Devi Theatre vs. Vishwanath Raju***¹⁰, the Apex Court upset an order made by the Karnataka High Court which had directed the admission of the appeal subject to condition of the appellant depositing Rs.75,000/- within a period of eight weeks. The Apex Court reiterated the position that this could not be done whilst clarifying that stay of execution would always be denied for failure to comply with the condition of deposit of decretal amount or any portion thereof. The relevant discussion is contained in paragraphs 5 & 6, which read thus:

“5. The learned counsel for the appellant submits that appeal lies from every decree passed by any court exercising original jurisdiction. The jurisdiction of the court in first appeal extends to examine the questions of facts as well as that of law. It is though true as pointed out by the learned counsel for the respondent that under Order 41 Rule 11 CPC it would be open for the court to dismiss the appeal in limine at the time of admission but even examining the matter from that point of view we find that the court while considering the question of admission of appeal filed under Section 96 CPC, may admit the appeal if considered fit for full hearing having prima facie merit. Otherwise, if it finds that the appeal lacks merits, it may be dismissed at the initial stage itself. But admission of the appeal, subject to condition of deposit of some given amount, is not envisaged in the provision as contained under Section 96 read with Order 41

10 (2004)7 SCC 337

Rule 11 CPC. The deposit of the money would obviously have no connection with the merits of the case, which alone would be the basis for admitting or not admitting an appeal filed under Section 96 CPC. Further, imposition of condition that failure to deposit the amount, would result in dismissal of the appeal compounds the infirmity in the order of conditional admission.

6. It is a different matter, in case the appellant prays for stay of the execution of the decree or for any order by way of an interim relief during the pendency of the appeal; it is open for the court to impose any condition as it may think fit and proper in the facts and circumstances of the case. Otherwise imposing a condition of deposit of money subject to which an appeal may be admitted for hearing on merits, is not legally justified and such order cannot be sustained.”

16] In the case of ***B.P. Agarwal & anr. vs. Dhanalakshmi Bank Ltd. & ors.***¹¹, the Division Bench of the Kerala High Court had directed the appellant to deposit a sum of Rs.5 Lacs, even though the appellant therein, had not applied for any stay against the execution of the impugned decree. Relying upon the authorities in cases of *Kayamuddin Khan (supra)* and *Devi Theatre (supra)*, the Apex Court vacated the stay by observing that in the absence of any application for stay, the High Court could not have made the direction for deposit of Rs.5 Lacs in the Trial Court within a particular time.

17] In case of ***Shantabai wd/o Shriniwas Singhee since deceased by LRs. Giriraj Shrinivasji Singhee & ors. Vs. Akola District***

11 (2008) 3 SCC 397

Central Cooperative Bank Ltd. & ors.¹², the Division Bench of this Court has held that imposing a condition of deposit of money subject to which an appeal can be admitted for hearing on merits is not legally justified. The reasoning is contained in paragraphs 7 to 12, which read thus:

7. *On behalf of applicants, it is argued that imposition of such a condition precedent for hearing of appeal:-*

- [a] Would defeat the purpose of Court's taking cognizance of such appeal.*
- [b] Would be resulting in compounding an error creeping in the order under appeal, due to which Court was pleased to admit the appeal.*
- [c] Results in approval of order impugned in appeal without hearing and application of mind, and for a default which is recognized by law to be mandatory pre-requirement for hearing of appeal on merits.*
- [d] Appeal is a right created by statute, and it cannot be taken away even by judicial order. Depending upon as to whether any Court is satisfied, Court may grant or refuse the prayer for stay or any other interlocutory order, and on such conditions, however, imposition of such a condition as a condition precedent for hearing of appeal results in taking away right of appeal.*
- [e] Jurisdiction to impose such a condition is neither provided or comprehended by law.*

8. *This Court finds support to the propositions advanced from following reported judgments :-*

- [a] B.P. Agarwal & another Vs. Dhanalakshi Bank Ltd. & ors. (2008) 3 SCC 397, [b] Management of Devi Theatre Vs. Vishwanath Raju Mh.L.J. (S.C) 1*

12 2010(6) Mh.L.J. 975

and [c] Mt. Afzali Begam Vs. Lala Kanhaya Lal, AIR 1932 Allahabad 511.

9. *On perusal of these judgments, it is seen that Their Lordships have held that imposing a condition for deposit of money subject to which an appeal be admitted for hearing on merits, is not legally justified.*

10. *Hon' ble Supreme Court has further observed that if the party is not able to comply with such conditions, it results in compounding the error due to which the appeal is being entertained.*

11. *We are satisfied that if an application for stay is filed, Court would consider such application on its merits, may order deposit or direct parties to furnish security or to do any other act or forbearance.*

12. *We are further satisfied that the para quoted above contained in the order dated 27th July, 2010 is adverse to the law of the land as seen in the binding precedents and is hence based on error apparent on the face, and we propose to delete said part."*

18] From the conspectus of the aforesaid decisions, it is clear that the Appeal Court would be well within its right to impose condition for deposit of reasonable rents for stay upon the execution of eviction decree. Further, in case of non-compliance with such condition, the stay can always be vacated and the execution of the eviction decree permitted. However, in the absence of any provisions under the Rent Act, the statutory right of appeal cannot be made dependent upon the condition of deposit of reasonable compensation. In the present case, no doubt, the respondent did not comply with the condition for deposit of reasonable compensation

imposed by the order dated 21 November 2012, by which the execution of eviction decree was stayed pending the appeal. For such non-compliance, the respondent has had to suffer eviction from the suit premises. The Appeal Court itself permitted the execution to proceed and in pursuance thereof, the respondent has already delivered the possession of the suit premises to the petitioner. The insistence that the respondent's Appeal No. 76 of 2012 be dismissed or at least hearing therein postpone until the respondent comply with the conditions imposed in the order dated 21 November 2012, is not an insistence which has the backing of law. Even if it is, presumed that the provisions contained in Order 39 Rule 11 of CPC are applicable to proceedings under the Rent Act, there is really nothing in the said provisions which oblige the Appeal Court to dismiss the appeal or to postpone the final hearing thereon until the appellant complies with the conditions imposed at the time of grant of stay upon execution of the eviction decree. This is more so, where the eviction decree stands executed and the appellant has already lost the possession of the suit premises. In the absence of a clear and categorical provision, there is no scope to nullify or whittle down the statutory right of the appeal, which incidentally, is the only appeal available under the Rent Act against any decree of eviction made by

the Small Causes Court. Accordingly, it is not possible to accept the contention of Mr. Naidu that the respondent's appeal be either dismissed or the hearing therein postponed until the respondent comply with the conditions of deposit of reasonable compensation imposed by the order dated 21 November 2012.

19] This petition is, accordingly, dismissed. There shall, however, be no order as to costs.

20] Mr. Naidu, learned counsel for the petitioner, applied for stay on further proceedings for a period of two weeks, before the Appeal Court as the petitioner desires to take recourse against this judgment and order before the Apex Court. There is really no case made out for grant of stay on further proceedings before the Appeal Court for a period of two weeks, because it is not really expected that the proceedings before the Appeal Court would be disposed of within a period of two weeks.

21] Certified copy is expedited.

(M.S. SONAK, J.)