IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.265 OF 2016
IN
FIRST APPEAL NO.140 OF 2010

Mukunddas Vithaldas Rathi and Anr. .. Applicants

vs.

Hansraj Merchant .. Defendant

Mr.Ashish Kamat a/w Mr.Himank Singh with Ms.Aditi Maheshwari with Ms.Sudeshna Guha i/b M/s.Vidhi Partners for the applicant

Mr.E.A.Sasi for the respondent

CORAM : K. K. TATED, J.
DATE : MARCH 1, 2016

P.C.:

1 Heard the learned counsel for the parties.

2 This application is preferred by plaintiff for stay of the the Judgment and Decree dated 26.11.2015 passed by the learned Judge, Bombay City Civil Court at Bombay in City Civil Suit No.4172 of 2009 (High Court Suit No.2239 of 2009) by which the applicant plaintiff's suit for recovery of the amount stands dismissed.

3 In the present proceeding, the applicant plaintiff initially filed

Suit No.2239 of 2009 in the High Court of Judicature at Bombay, Ordinary Original Civil Jurisdiction for decree directing respondent defendant to pay sum of Rs.11,71,288/- along with interest @ 12% from 25.6.2009 till realisation and Rs.10,00,000/- by way of damages for the mental harassment caused to the applicant plaintiff. Following were the prayers in that Suit.

> "(a) the Hon'ble Court be pleased to pass a decree directing defendant to pay a sum of Rs.11,71,288/- alongwith interest @ 12% from 25.6.2009 i.e. the date of payment of money to the defendant till the realisation thereof.
>
> (b) the Hon'ble Court be pleased to direct Defendant to pay Rs.10,00,000/- as and by way of damages for the mental harassment caused to the plaintiffs.
>
> (c) interim reliefs in the respect of prayer (a)
>
> (d) cost of the present suit.
>
> (e) Any other relief in the interest of justice, equity and good conscious."

4 During the pendency of the said Suit in view of pecuniary jurisdiction of the Bombay City Civil Court at Bombay, suit was transferred to the City Civil Court and re-numbered as Suit No.4172 of 2009. After hearing both the sides and considering oral and documentary evidence on record the Trial Court dismissed the Suit. Operative part reads thus:

> "Suit is dismissed with cost."

5 Being aggrieved by the said decree, the applicant plaintiff filed present First Appeal. Same was admitted by this court by order dated 5.2.2016. Hence, Civil Application is for stay of the trial court's decree.

6 The learned counsel for the applicant submits that the Trial Court erred in coming to the conclusion that the applicant failed to prove his case. He submits that the learned trial Judge failed to appreciate that the sole ground of denial by the respondent / defendant for acceptance of Rs.10,00,000/- from the applicant was that the applicant's claim was fictitious and false and made only because of personal grudge of the applicant against the respondent. He submits that the Trial Court failed to appreciate that during the course of trial, the applicant placed on record the Assessment Order passed by the Income Tax Officer in matter against the respondent defendant for the Assessment Year 2008-09. He submits that applicant filed Tax Evasion Petition dated 12.2.2010 against the respondent defendant alleging that the respondent defendant accepted cash of Rs.10,00,000/- from him during the time when he was Chairman of Shri Shantiniketan Cooperative Housing Society Ltd. for issuing no objection certificate and transferring residential flat. He submits that the Income Tax Officer gave finding that as respondent defendant failed to show source of income of Rs.10,00,000/-. The Income Tax Officer treated sum of Rs.10,00,000/- as unexplained money under section 69A of the Income Tax Act, 1961 and added back to the Assessee's/defendant's income for the year under consideration. Penalty proceeding under section 271(1)(c) of the Income Tax Act, 1961 was separately initiated. He submits

that the bare reading of Assessment Order passed by the Income Tax Authorities in respect of respondent defendant's Assessment Year 2008-09 shows that the respondent accepted sum of Rs.10,00,000/- from the applicant for transfer of his flat in the suit society.

7 The learned counsel for the applicant submits that between applicant and respondent several litigations are pending in different courts. He submits that even criminal case is pending between both the parties. He submits that at the time of delivering the Judgment and Decree dated 26.11.2015 the Trial Court made several observations which may affect the rights of the parties before criminal court. He submits that at several places the Trial Court observed that the applicant plaintiff failed to prove that the respondent defendant accepted sum of Rs.10,00,000/- from the applicant for transfer of his flat in his name. He further submits that the respondent defendant filed their Affidavit in reply in the present Civil Application. In that reply, they specifically stated in paragraph 18 that, from the observations made by the Trial Court in judgment conclusively proves that the applicant plaintiff and his witness P.W.No.2 committed offence punishable under section 193 of the Indian Penal Code for which he shall be taking up appropriate proceedings under the provisions of section 340 of the Criminal Procedure Code. He submits that in the interest of Justice this Hon'ble Court be pleased to stay the observations made by the Trial Court in the impugned the Judgment and Decree against the applicant during the pendency of the present First Appeal.

8 The learned counsel for the applicant submits that the following

observations if not stayed the respondent defendant may take advantage of that in the matters pending between the parties before the Criminal Court. Those observations are as under:

> “a) Paragraph 11:- There is no whisper in both these complaints by the plaintiffs that pursuant to the illegal demand by the defendants, they made payment of Rs.10,00,000/- to him.
>
> b) Paragraph 13:- It also seems that the plaintiffs have simply used bare words like threats, extortion, coercion, undue influence and pressure as illegal gratification without giving any details about the same while making the alleged demand of Rs.10,00,000/- by the defendant. Thus, a bald statement in this regard is of no significance. Each of the above terms has to be established independently. Rather I say that it transpired from the pleadings as well as evidence tendered by the plaintiffs that the defendant simply demanded Rs.10,00,000/- from them and they have paid it. I think that no literate person will commit such mistake. Thus, the evidence of P.W.No.1 Rajesh in the aforesaid manner is unworthy of credence.
>
> c) Paragraph 14:- There is one more circumstance which dispels me from accepting the above case of the plaintiffs. Undisputedly, the suit property was gifted by Gokuldas Rathi to the plaintiffs in their personal capacity under the registered gift deed dated 11.12.2007 (exhibit 17). However, according to P.W.No.1 Rajesh on 27.12.2007 he had withdrawn a cash amount of Rs.10,00,000/- from the bank account if the suit firm and the said amount has been shown in its account book as it had paid to the defendant for effecting necessary changes in the record of the society. There was no reason at all either stated or made out for the suit firm to pay any such amount to the defendant when the firm is in no way concerned with the suit property.

d) Paragraph 17:- It is really a fantastic stand taken by the businessman (PW-1 Rajesh) who withdrew a huge amount of Rs.10,00,000/- from his firm and paid it to another person in cash and had shown the said amount as if it was in cash in hand of the firm.

e) Paragraph 18:- Moreover, when a businessman is making payment towards illegal demand, I am of the view that he will not make entry of the same in his account books. If he does so, it is expected from him that before fulfillment of such demand he would report the matter to the property authority and would make payment by cheque.

f) Paragraph 19:- Besides, there was no such compelling circumstance for the plaintiff to fulfill the alleged demand of Rs.10,00,000/- by the defendant on 20.01.2008 particularly when PW-1 Rajesh was aware that the society has already passed the resolution allowing the transfer of the suit property in their favour. Now, if the evidence of the abovesaid nature is believed to be true, then it becomes clear that pleadings and evidence in respect of the alleged demand of Rs.10,00,000/- by the defendant and its fulfillment by the plaintiffs must be a work of fiction and therefore, it would be unsafe to rely on the testimony of PW-1 Rajesh.

g) Paragraph 21:- It seems from the evidence of PW-2 Manish Gokani that he was simply a spectator to the alleged incident of payment of Rs.10,00,000/-. He categorically stated that he has not informed the secretary or any office bearer of the society about the alleged payment of Rs.10,00,000/-. He could not explain as to what was the reason for keeping mum in respect of such an untoward incident. It makes the evidence of this witness unworthy of credence.

h) Paragraph 23:- All these facts appear to have been invented in the police complaint without there being any foundation in the alleged written complaint dated

> 01.02.2008 (exhibit 12) made by them to the society. So also, these facts are missing from the evidence of PW-1 Rajesh. These inconsistent, unbelievable and unconvincing statements made by the plaintiffs at various stages and before different authorities lead to the only conclusion that the story propounded by the plaintiffs that there was an illegal demand of Rs.10,00,000/- by the defendant and that they have fulfilled the same does not appear probable if examined on any test of probability."

9 The learned counsel for the applicant submits that just bare reading of the observations made by the Trial Court in impugned judgment shows that the Trial Court failed and neglected to consider the evidence properly. He submits that though the suit filed by the applicant plaintiff stands dismissed with costs, this Hon'ble Court can stay the observations in the impugned the Judgment and Decree under Order 41 Rule 5 of the Civil Procedure Code, 1908. In support of this contention, the learned counsel for the applicant relies on the judgment of the Apex Court in the matter of ***Smt.Ganga Bai vs. Vijay Kumar and Others***[1] particularly paragraph 15, 17 and 18 which reads thus:

> "15. It is thus clear that the appeal filed by defendants 2 and 3 in the High Court was directed originally not against any part of the preliminary decree but against mere finding recorded by the trial court that the partition was not genuine. The main controversy before us centers round the question whether that appeal was maintainable on this question the position seems to us well-established. There is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring suit of a civil nature and

1 1974(2) SCC 393

unless the suit is barred by statute one may, at ones peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute.

17. These provisions show that under the CPC, an appeal lies only as against a decree or as against an order passed under rules from which an appeal is expressly allowed by Order 43, Rule 1. No appeal can lie against a mere finding for the simple reason that the Code does not provide for any such appeal. It must follow that First Appeal No. 72 of 1959 filed by defendants 2 and 3 was not maintainable as it was directed against a mere finding recorded by the trial court.

18. The High Court mixed up two distinct issues : one, whether it was competent to defendants 2 and 3, if they were aggrieved by the preliminary decree of file an appeal against that decree; and two, whether the appeal such as was filed by them was maintainable. If it be correct that defendants 2 and 3 could be said to have been aggrieved by the preliminary decree, it was certainly competent for them to challenge that decree in appeal. But they did not file an appeal against the preliminary decree and therefore the question whether they were aggrieved by that decree and could file an appeal there from was irrelevant. While deciding whether the appeal filed by defendants 2 and 3 was maintainable, the High Court digressed into the question of the competence of defendants 2 and 3 to file an appeal against the preliminary decree and taking the view that it was open to them to challenge that decree even though the suit was wholly dismissed against them,

> the High Court held that the appeal, which in fact was directed against a finding given by the trial court, was maintainable. It the High Court had appreciated that the two questions were distinct and separate, it would not have fallen into the error of deciding the latter question by considering the former.”

10 The learned counsel for the applicant plaintiff on the basis of above mentioned submissions and the law declared by the Apex Court in the matter of ***Smt.Ganga Bai vs. Vijay Kumar and Others*** (Supra) submits that this Hon'ble Court be pleased to stay the observations made by the Trial Court against the applicant plaintiff in the impugned the Judgment and Decree till the hearing and final disposal of the First Appeal. He submits that if those observations are not stayed, irreparable loss and injury will be caused to the applicant. He submits that applicant has good chance of success in the present matter.

11 On the other hand, the learned counsel for the respondent defendant vehemently opposed the present Civil Application. Respondent filed their Affidavit in reply dated 10.2.2016. The learned counsel for the respondent submits that the Trial Court by impugned the Judgment and Decree dated 26.11.2015 dismissed the plaintiff's suit. Therefore, there is no question of staying the said decree at all. He further submits that the observations made by the Trial Court is on the basis of documents on record. He submits that the applicant failed to prove the fact that the respondent defendant demanded and accepted sum of Rs.10,00,000/- from the applicant plaintiff for transferring the flat in his name in Shri Shantiniketan Co-operative Housing Society Ltd., 95-A Marine Drive, Mumbai 400 002 when the

respondent defendant was acting as a Chairman. He submits that one Mr.Gokuldas Vithaldas Rathi was the owner of residential property bearing flat no.17, Shri Shantiniketan Co-operative Housing Society Ltd., 95-A Marine Drive, Mumbai 400 002 along with one garage on the ground floor i.e. suit property. The said Gokuldas gifted the suit property to the applicant plaintiff by executing gift deed dated 11.12.2007. At that time, the plaintiff approached the defendant for no objection from the Co-operative Society. That time, the plaintiff alleged that the defendant demanded the sum of Rs.10,00,000/-. He submits that actually applicant by his letter dated 17.1.2008 made complaint with District Deputy Registrar, Co-operative Societies, Mumbai 400 001 that the respondent as a Chairman of the Society forced the applicant to deposit Rs.5 Lacs against granting NOC from the Society. It was also stated in the said complaint that the respondent defendant forced the applicant to pay Society transfer charges of Rs.50,000/- inspite of his full knowledge that this money does not need to be paid when the flat has been gifted by Gokuldas Rathi to his brother and applicant. He submits that no where in the said letter/complaint dated 17.1.2008, applicant raised any objection that respondent defendant demanded sum of Rs.10,00,000/- for doing needful in favour of applicant. He submits that this itself shows that the applicant on his own created a story about payment of Rs.10,00,000/- to the respondent.

12 The learned counsel for the respondent further submits that the applicant paid transfer charges to the Society on 20.1.2008. Thereafter the applicant wrote complaint to the District Deputy Registrar Co-

operative Society, Mumbai 400 001 against the respondent/defendant. In that complaint also the applicant no where stated that the respondent defendant demanded and accepted sum of Rs.10,00,000/- to do favourable things in favour of applicant. He submits that this itself shows that the applicant filed the suit in Trial Court on false averments. Hence, the Trial Court rightly held that the applicant plaintiff failed to prove fact that the defendant demanded and accepted sum of Rs.10,00,000/- from the applicant plaintiff.

13 The learned counsel for the respondent submits that though the applicant filed dispute before the Co-operative Court, Mumbai 400 001 being case No.I/248/2008 on 26.9.2008 against the Society and respondent defendant, nowhere it was stated in that dispute about demand and payment of Rs.10,00,000/-. He submits that in that dispute the applicant prayed following reliefs :

> "(a) The above dispute be adjudicated under the provisions of Section 91 to 96 of the Maharashtra Co-operative Societies Act, 1960 and Rules, 1961.
>
> (b) It is hereby declared that the Opponents are not entitled to charge or accept Transfer charges during Transfer of premises inter se between the members of the family.
>
> (c) The Opponents be ordered and directed to refund to the Disputants the sum of Rs.5,00,000/- collected from the Disputants as an alleged "Voluntary Donation" and the sum of Rs.50,000/- collected from the Disputants towards Transfer Charges together with interest thereon at 21% per annum or such other rate being the rate of interest charged by the Opponents on overdue payments from its members.

> (d) Pending the hearing and final disposal of the above Dispute this Hon'ble Court be pleased to Order and direct the Opponents to deposit the sum of Rs.5 Lakhs and the sum of Rs.50,000/- in this Hon'ble Court which this Hon'ble Court may direct to be invested.
>
> (e) Interim and ad-interim reliefs in terms of prayer (d) hereinabove be granted;
>
> (f) Cost of the Dispute be awarded;
>
> (g) Such further and other reliefs as the nature and circumstances of the case may require be granted.”

14 The learned counsel for the respondent submits that bare reading of the said dispute shows that the applicant no where discloses the fact that he had any grievance against the respondent defendant. These facts are considered by the Trial Court at the time of deciding the suit. Hence, there is no question of staying the observations made by the Trial Court at the time of passing the the Judgment and Decree. He submits that in any case the suit filed by the applicant plaintiff stands dismissed with costs. In a dismissed suit there is no question of staying the observation made by the Trial Court. He submits that in any case several litigations are going on between the parties in different courts. Hence, if any stay is granted in the present proceeding the respondent's interest will be affected in other pending matters.

15 The learned counsel for the respondent defendant submits that counsel for the applicant plaintiff failed to show any provision in Civil Procedure Code, 1908 that the observation made by the court in the

Judgment and Decree can be stayed at appellate stage. Hence, there is no substance in the present Civil Application and same be dismissed with costs.

16 I have heard both the sides at length. It is to be noted that in the present proceeding, applicant filed suit for recovery of sum of Rs.10,00,000/- against the defendant and for other reliefs. In that though the applicant placed on record several documents the Trial Court discarded the evidence and held that the applicant failed to prove his case. Hence, the Trial Court dismissed the plaintiff's suit with costs. There is no dispute that the First Appeal is maintainable against impugned decree. Only question comes whether observations made by the Trial Court in the Judgment and Decree can be stayed during the pendency of the First Appeal. It is to be noted that the observation made by the Trial Court in the impugned the Judgment and Decree were for deciding the dispute between both the parties on its own merits, after considering the evidence on record and documents produced by both the parties. Applicant's Counsel has not shown any provision in Civil Procedure Code, 1908 that only observation made by the Trial Court can be stayed during the pendency of the appeal. Considering these facts and averments made in Civil Application, I am of the opinion that applicant failed to make out any case for staying the specific observation made by the Trial Court. Authority relied by the Applicant in the matter of Smt. Gangabai (Supra) is not applicable on the facts of the case. In any case the applicant in the present Civil Application made prayer only for stay of the operation and implementation of the impugned the Judgment and Decree dated

26.11.2015. Prayer clause (a) of the Civil Application reads thus:

> "(a) Pending the hearing and final disposal of this Appeal this Hon'ble Court be pleased to stay the execution, operation and implementation of the Judgment and Order dated 26.11.2015 passed by the learned Judge, Bombay City Civil Court, Greater Bombay in City Civil Suit No.4172 of 2009 and all consequential orders there to."

17 Bare reading of prayer clause (a) of the Civil Application shows that applicant is seeking stay of the execution operation and implementation of the judgment and order dated 26.11.2015 passed by Bombay City Civil Court at Bombay. There is no specific prayer for stay of the observations made by the Trial Court in the impugned judgment. Hence, I am of the opinion that the decree as it is passed by the Trial Court cannot be stayed in the present Civil Application.

18 Hence, Civil Application stands dismissed.

(K.K.TATED, J.)