

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.3002 OF 2017
IN
FIRST APPEAL NO.1198 OF 2017

Smt.Surekha Kolbekar Telang ... Applicant / Appellant

Vs.

Smt.Madhu K. Shah & anr. ... Respondents

Mr.Uday Bobde i/b Jaikumar N. Shiradhankar for the Applicant /
Appellant

Ms.Soumya Srikrishna with Karishma Shirke i/b Gordhandas and
Fozdar for Respondent Nos.1 and 2

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE: **NOVEMBER 8, 2017**

P.C.:

1. This Civil Application is filed seeking stay of the judgment and decree dated 12.7.2017 passed by the City Civil Court, Bombay, in Suit No.2798 of 2012. The respondents had filed a civil Suit for specific performance in respect of the suit premises bearing Flat No.101, Building No.56, Evershine Halley CHS Ltd, Thakur Village, Kandivali (East), Mumbai-400101, on the basis of a Memorandum of Understanding dated 6.3.2010. The suit was decreed and as per the operative portion of the impugned order passed by the learned trial Judge, the defendant i.e., the present appellant, was directed to

execute a registered deed of conveyance of the suit premises in favour of plaintiff Nos.1 and 2 after accepting an amount of consideration of Rs.54 lakhs.

2. The learned Counsel for the applicant / appellant has submitted that the appellant has good grounds in the appeal and submits that the judgment and decree passed by the learned Judge of the City Civil Court is illegal and needs to be stayed. The learned Counsel for the applicant while praying for stay of the said judgment and decree, has pointed out the documents which were exhibited by the learned Judge of the trial Court. He submitted that the suit for specific performance was decreed on the basis of an unregistered Memorandum of Understanding, which is not accepted by the appellant. He further submitted that the issue in respect of two Memoranda of Understanding is also involved. He further submitted that if the impugned judgment and decree is not stayed, then, the appellant will lose possession of the suit flat and will suffer a substantial loss.

3. Per contra, the learned Counsel for the respondents/original plaintiffs, has submitted that the transaction between the plaintiffs and the defendant took place in the year 2010 and on the basis of

the Memorandum of Understanding, the suit for specific performance was filed in 2012. The respondents / plaintiffs are prosecuting this matter since 2012 and, therefore, it would not be proper to stay the execution and implementation of the decree which will be unjust as the respondents/plaintiffs will be deprived of the fruits of the judgment and decree. She has further submitted that it being a suit for specific performance, the plaintiffs have in fact fulfilled all the requirements of specific performance and have also shown their readiness and willingness to pay the amount and have obtained a loan for the remaining amount of Rs.54 lakhs and have also offered the said amount to the appellants which they have refused to accept. She has further submitted that it is necessary for the appellant to show that substantial loss will be caused to them if at all the stay of the impugned order is not granted. She submitted that mere loss of possession of the suit premises will not be a substantial loss but substantial loss is more than something than the loss of losing the possession.

4. In order to substantiate her submission on the point of substantial loss as also on the point of not disclosing the sufficient cause in the application for stay, the learned Counsel for the

respondents relied on the judgment of Rajasthan High Court in the case of **Bansidhar vs. Pribhu Dayal**¹; on the judgment of the Lahore High Court in **Rajindra Singh vs. Umrao Singh**² and also on the judgment of the Nagpur Bench of this Court in the case of **Anandiprasad v.s. Govind Bapu**³.

5. In the judgment of **Anandiprasad (supra)** of the Nagpur Bench, the learned Single Judge of this Court has held that in order to show et the substantial loss, it should be loss more than what should ordinarily result from the execution of the decree in normal circumstances.

6. By way of reply, the learned Counsel for the applicant/appellant has relied on the judgment of the Supreme Court on the case of **Atma Ram Properties (P) limited vs. Federal Motors (P) Ltd.**^{4.v}

7. Heard the submissions. Perused the affidavits and documents which are pointed out by the learned Counsel for both the sides.

8. In the judgment of **Bansidhar (supra)** of the Rajasthan High Court, the plaintiff was having a decree of the District Judge of

1 AIR 1954 RAJASTHAN 1

2 1921 Indian Cases Vol.LXI 827

3 AIR 1934 Nagpur 160 (D)

4 (2005) 1 SCC 705

Rs.2,750/-. It was shown by the learned Counsel for the decreeholder that the judgment debtor has sufficient money to satisfy the money decree. In that context, the Court held that an appeal by itself does not operate as stay of proceedings under decree or order appealed unless the appellant shows sufficient cause. In the said judgment, the learned Single Judge relied on the ratio laid down in the case of **Anandiprasad vs. Govind Bapu (supra)**.

9. The suit of **Anandiprasad vs. Govind Bapu (supra)**, was based on deed of mortgage. In the said matter, the Court was dealing with the suit for mortgage. Before the appellate Court, in the application, the grounds pleaded for stay were found vague. It was pleaded that the appellant would be arrested and would be sent to civil prison and there will be loss of business and his reputation. The ground pleaded though is valid, the learned Judge has held that there was no material placed before the Court that the appellant was not in a position to pay money and, therefore, he would have to be sent to civil prison. Substantial loss means something more than ordinary loss to judgement debtor due to execution.

10. Thus, the issue before the Rajasthan high Court and the Nagpur Bench of this Court, though is in respect of under Order 41

Rule 5 of the Civil Procedure Code, in both the cases, the decree was not of possession.

11. In the decision given by the Lahore High Court in the case of **Rajindra Singh vs. Umrao Singh (supra)**, there was a decree of possession of immovable property and the stay was prayed in appeal. It was held by the learned Single Judge that unless the three circumstances mentioned in sub-clauses (a), (b) and (c) of sub-Rule (3) of Rule 5 of Order 41, the Appeal Court should not grant stay. The learned Judge has held that the Court has to bear important things in mind before making an order of stay of execution of the decree whether the party applying for stay has succeeded in showing that substantial loss will result if the order is not made. The learned Judge has held that the delivery of possession is a natural consequence of a decree and therefore execution cannot be stayed, especially on a vague statement. Thus, the decision of the Lahore High Court is in favour of the decreeholder wherein it is held that losing possession cannot be considered as substantial loss.

12. While considering an application under Order 44 Rule 5 of the Civil Procedure Code, the appellate Court needs to consider whether

there is any sufficient cause to grant stay and while examining the sufficient cause, the appellate Court has to apply the parameters of sub-rule (3) of Rule 5 of Order 41 of the Civil Procedure Code. The Legislature has used the words 'that the applicant has to show that he is going to suffer a substantial loss if the stay is not granted'. Thus, granting stay to the judgment and decree of the trial Court is not a mechanical or a routine matter. However, the Judge has to consider what is a substantial loss caused to the appellant if stay is denied. After going through the judgment and the order passed therein, and considering the prayers in the suit, the appellate Judge in fact himself gets a clear idea of substantial loss which is going to cause the appellant / judgment debtor if stay is denied. In a suit for possession of immovable property, losing possession is a substantial loss. In support of this, I rely on the judgment of the Supreme Court in the case of **Atma Ram Properties (P) limited vs. Federal Motors (P) Ltd.** (supra), wherein the Supreme Court has held thus:

13. However, in the case of **Atma Ram Properties (P) Ltd. (supra)**, the Supreme court has held thus:

“9. 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 within the meaning of clause (a) of sub-rule (3) of Rule 5 of Order 41 of the Code. Clause (c) of the same provision mandates security for the due performance of the decree or order as may ultimately be passed being furnished by the applicant for stay as a condition precedent to the grant of order of stay. However, this is not the only condition which the appellate Court can impose. The power to grant stay is discretionary and flows from the jurisdiction conferred on an appellate Court which is equitable in nature. To secure an order of stay merely by preferring an appeal is not the statutory right conferred on the appellant. So also, an appellate 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. Depending on the facts and circumstances of a given case an appellate Court, while passing an order of stay, may put the parties on such terms the enforcement whereof would satisfy the demand for justice of the party found successful at the end of the appeal. In our opinion, while granting an order of stay under Order 41 Rule 5 of the CPC, the appellate court does have jurisdiction to put the party seeking stay order on such terms as would reasonably compensate the party successful at the end of the appeal in so far as those proceedings are concerned. 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 commonsense, 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. After all, in the words of Chief Justice Chandrachud, speaking for the Constitution Bench in *Olga Tellis and Ors. Vs. Bombay Municipal Corporation and Ors.* (1985) 3 SCC 545, - "commonsense which is a cluster of life's experiences, is often more dependable than the rival facts presented by warring litigants".

In the present case, considering the relief claimed and granted in the

suit and the averments made in the application for stay, it is clear that the appellant/defendant is to lose her possession of the suit flat if the execution proceeding is not stayed. The ratio laid down in the case of **Rajindra Singh vs. Umrao Singh (supra)**, though it is useful and in favour of the respondent, it is a judgment given by a learned Single Judge of the Lahore High Court. However, the ratio laid down in the case of **Atma Ram Properties Pvt. Ltd. (supra)**, the Supreme Court has held that losing possession is a substantial loss and thus, sufficient cause is made out by the applicant.

14. The learned Counsel for the respondents has further submitted that if the Court is going to stay the execution and operation of the judgment and decree till the final hearing of the appeal, then, it will cause great prejudice to the respondents, who are decreeholders. She submitted that though the order of the trial Court is in favour of the plaintiffs, they will not be able to enjoy the suit premises and the Judgement Debtors i.e., the appellants, are going to be in possession of the suit premises. She submitted that it is necessary to put the applicant / appellant to some terms so that the respondents/plaintiffs can be compensated to a certain extent. She has further submitted that in the same building, the respondents own another flat and the

said flat is let out on leave and licence by the respondents for a monthly licence fee of Rs.36,000/-. She submits that the respondents, therefore, are entitled to get approximately Rs.36,000/- per month by way of royalty / compensation from the appellants. The respondents have filed their affidavit in reply to this application. However, in the reply, no such averments are made or such prayer is made. Therefore, the above prayer cannot be entertained, at this stage. The respondents may file such application, if so advised.

15. Thus, under these circumstances, I am of the view that in the present case, the applicant has made out a case and shown a sufficient cause that substantial loss is going to be caused to him as the appellant is not only going to lose the possession of the suit premises but he will have to execute a deed of conveyance in respect of suit premises in favour of the respondents. I, therefore, stay the impugned order dated 12.7.2017. The applicant/appellant is directed that he shall not dispose of or create third party interest or part with the possession of the property in any manner, till the appeal is finally disposed of.

16. The respondents may move separate application for compensation/royalty, if they want.

17. Civil Application stands disposed of accordingly.

(MRIDULA BHATKAR, J.)