

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISDICTION

WRIT PETITION NO. 5893 OF 2018

Vijay Vishnupant Karekar	]	Petitioner
Vs.		
Ranjit Ratnakar Karekar	]	Respondent

.....

Mr. P.D. Dalvi, for Petitioner.
Mr. Amit Borkar, for Respondent.

....

CORAM : R.G. KETKAR, J.
DATE : 1st October, 2018.

P.C:

Heard Mr. Dalvi, learned Counsel for the petitioner and Mr. Borkar, learned Counsel for the respondent at length.

2. This Petition takes exception to clauses (iii) and (iv) of the operative part of the order dated 15th January, 2018 passed by the learned District Judge-I, Kolhapur below Exhibit 22 in Regular Civil Appeal No.39 of 2015. Clauses (iii) and (iv) read thus;

“(iii) The appellant shall deposit compensation of Rs.15,000/- per month from the date of this order onward regularly in each month before 5th, during the pendency of the appeal.

(iv) If the appellant fails to deposit compensation amount as mentioned above for the period of three consecutive months, the stay granted to the impugned decree, stands automatically vacated.

3. In support of this Petition, Mr. Dalvi submitted that by order dated 6th January, 2015, Regular Civil Suit No.887 of 2009 instituted by the respondent/plaintiff was decreed by the learned Joint Civil Judge Junior

Division, Kolhapur. Aggrieved by that order, the petitioner, hereinafter referred to as “defendant” has instituted Regular Civil Appeal No.39 of 2015 under section 96 r/w Order-XLI of the Code of Civil Procedure, 1908 (for short 'C.P.C'). Pending that appeal, the defendant took out application Exhibit 7 on 28th January, 2015 under Order-XLI, Rule-5 of the C.P.C for staying eviction decree. By order dated 12th October, 2015, the learned Adhoc District Judge-3, Kolhapur had allowed the application and stayed eviction decree till final disposal of the appeal subject to the condition that the defendant depositing entire arrears of rent in the Court within 30 days and paying further rent regularly on or before 5th day of each month as per English Calender.

4. Mr. Dalvi submitted that in the first place, the plaintiff did not challenge that order. In other words, the plaintiff accepted the correctness of the said order. Secondly, the defendant has complied the order dated 12th October, 2015 by depositing entire arrears of rent within 30 days and is regularly paying the rent on or before 5th day of each month. Thirdly, the directions contained in clauses (iii) and (iv) which are impugned in the present Petition are issued while deciding application filed by the defendant under Order-VI, Rule-17 of the C.P.C. He, therefore, submitted that the learned District Judge was not justified in directing the defendant to deposit compensation @ Rs.15,000/- per month during pendency of the appeal and if the defendant fails to deposit amount as mentioned in clause (iii) within the stipulated period, stay granted to the impugned decree will stand automatically vacated. He, therefore, submitted that clauses (iii) and (iv) of the impugned order deserve to be set aside.

5. On the other hand, Mr. Borkar submitted that even if at the time of considering application under Order-XLI, Rule-5 of C.P.C, condition is not imposed by the District Court while staying eviction decree, the Appellate

Court is not powerless to impose that condition subsequently. He, therefore, submitted that no case is made out for interfering with clauses (iii) and (iv) of the impugned order.

6. I have considered rival submissions advanced by the learned Counsel for the parties. I have also perused the material on record. The following facts are not in dispute;

[a] The suit instituted by the plaintiff was decreed on 6th January, 2015.

[b] Aggrieved by that decision, the defendant has filed Civil Appeal No.39 of 2015 on 28th January, 2015.

[c] Along with appeal, application under Order-XLI, Rule-5 of C.P.C is taken out for staying eviction decree.

[d] By order dated 12th October, 2015, the learned District Judge has allowed the application in the following terms;

The impugned judgment and decree of the learned Lower Court is hereby stayed till the final disposal of appeal subject to condition that appellant to deposit entire arrears of rent within 30 days and to pay further rent regularly on or before 5th day of each month as per English Calender”.

[e] The plaintiff has not challenged the said order.

[f] The defendant filed application under Order-VI, Rule-17 of C.P.C on 5th March, 2016 for amending the written statement. While allowing that application, the learned District Judge issued directions contained in clause (iii) and clause (iv) extracted hereinabove.

The moot question is whether the learned District Judge was justified in issuing these directions or not. Rule-5 of Order-XLI of C.P.C. reads thus;

- “5 Stay by Appellate Court.** (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

[Explanation. An order by the Appellate Court for the stay of execution of the decree shall be effective from the date of the communication of such order to the Court of first instance, but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the Appellate Court shall, pending the receipt from the Appellate Court of the order for the stay of execution or any order to the contrary, be acted upon by the Court of first instance.

- (2) Stay by Court which passed the decree. Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.
- (3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied.
- (a) that substantial loss may result to the party applying for stay of execution unless the order is made;
 - (b) That the application has been made without unreasonable delay; and
 - (c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.
- (4) [Subject to the provisions of sub-rule(3)], the Court may make an ex parte order for stay of execution pending the hearing of the application.

[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”.

7. In the case of **Atma Ram, Properties (P) Ltd. V. Federal Motors (P) Ltd., (2005) 1 SCC 705**, the Hon'ble Apex Court in paragraph 9 observed thus;

“.....

In our opinion, while granting an order of stay under Order 41 Rule 5 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 insofar as those proceedings are concerned.

....

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”.

8. In paragraph 18, it is observed thus;

“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 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 jurisdiction 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”.

9. In the case of **State of Maharashtra and another Vs. Super Max International Private Limited and others**, (2009) 9 Supreme Court Cases 772, the Apex Court observed that there was no conflict between **Atma Ram, Properties (P) Ltd** (supra) and **Niyas Ahmad Khan V. Mahmood Rahmat Ullah Khan**, (2008) 7 SCC 539. In paragraph 76, the Apex Court expressed its respectful agreement with the decision in **Atma Ram, Properties (P) Ltd's** case. In paragraph 77, it was observed thus;

“In the light of the discussions made above we hold that in an appeal or revision preferred by a tenant against an order or decree of an eviction passed under the Rent Act it is open to the appellate or the Revisional Court to stay the execution of the order or the decree on terms, including a direction to pay monthly rent at a rate higher than the contractual rent. Needless to say that in fixing the amount subject to payment of which the execution of order/decreed is stayed, the Court would exercise restraint and would not fix any excessive, fanciful and punitive amount”.

10. Applying the tests laid down by the Apex Court in the case of **Atma Ram, Properties (P) Ltd** (supra) and **State of Maharashtra and another** (supra) to the facts of the present case, in my opinion, while staying the eviction decree by order dated 12th October, 2015, the learned District Judge did not properly exercise equitable discretionary jurisdiction. It is undoubtedly true that the plaintiff did not challenge that order but that does not preclude the Appellate Court in imposing these conditions subsequently.

11. In paragraph 17, the learned District Judge observed that suit property admeasuring 20.1 square meter on the ground floor plus additional two floors is occupied by the defendant. The suit property situate in Saraf Bazar and the defendant is carrying on jewellery business. As the suit premises is used for commercial purpose, the learned District Judge found it appropriate to direct the defendant to pay interim compensation @ Rs. 15,000/- per month

during pendency of the appeal. I do not find that the learned District Judge has fixed excessive, fanciful and punitive compensation.

12. In the light of the aforesaid discussion, no case is made out for invocation of powers under Article 227 of the Constitution of India. Hence, the Petition fails and the same is dismissed.

[R.G. KETKAR, J.]