

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION No.4249 OF 2018

Rajesh Khemchand Sharma	...	Petitioner
V/s.		
Kanhaiya Jawaharsingh Manshingani & Ors.	...	Respondents

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Mr.Dharam Sharma i/b.Dharam & Co.,Advocate for the Petitioner.

Shri.Amit H. Yadav, Advocate for the Respondent No.1.

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CORAM : M.S.SONAK, J.

DATED : 19th DECEMBER 2018.

P.C. :

1 Heard Mr.Dharam Sharma for the Petitioner and
Mr.Amit Yadav for the Respondent No.1.

2 Rule.

3 Rule is made returnable with the consent and at the
3 request of learned Counsel for the parties.

4 The challenge in this petition is to the Order dated
12/10/2017 made by the Appeal Court rejecting the petitioner's
application at Exhibit 18 seeking for dismissal of appeal on the

ground that the respondents have failed to honour the Order dated 12th August 2016 in so far as deposit of compensation of Rs.30,000/- per month and the deposit of contractual rent of Rs.425/- per month.

5 Mr.Sharma, the learned Counsel for the petitioner submits that even though the provision of Order 39 Rule 11 of the Code of Civil Procedure is discretionary, this is a fit case for exercise of discretion since the respondent continued in possession of the suit premises on the basis of interim Orders, but without complying with the conditions for payment of compensation and rent. Mr.Sharma submits that in such situation the appeal instituted by respondent No.1 should have been dismissed without even hearing him on merits.

6 Mr.Yadav, the learned Counsel for the respondent No.1 submits that by Order dated 12th August 2016, the respondent No.1 was granted a stay subject to fulfillment of certain conditions as to deposit of compensation and rent. Since, the respondent No.1 was unable to arrange for the compensation amount, the respondent No.1 lost the protection of interim Order and has since been evicted by the petitioner. Mr.Yadav submits that the substantial right of appeal of the respondent No.1 cannot be defeated by invoking the provision of Order 39 Rule 11 of the Code of Civil Procedure.

7 Mr.Yadav submits that consequences of non-deposit had been set out in Order dated 12/08/2016 itself and there is no question of the respondent No.1 being required to face any further consequences by invoking provision of Order 39 Rule 11 of the Code of Civil Procedure or otherwise. He relies on the Judgment of Nagpur Bench of this Court in the matter of ***Prabhakar v. Vinayakrao***¹ and Judgment of the Honourable Apex Court in the matter of ***Kayamuddin Shamsuddin Khan v. State Bank of India***² in support of his contentions.

8 The rival contentions now fall for determination.

9 The operative portion of the Appeal Court Order dated 12/08/2016 reads thus :

“ORDER

Execution of the decree dated 10/09/2012 passed in R.A.E.Suit No.316/445 of 2006 is stayed until final decision in the present appeal on the following conditions :

(1) The appellant shall deposit arrears of interim compensation @ Rs.30,000/- (Rs.Thirty Thousand only) towards use and occupation of the suit premises from September 2012 to August 2016 within a period of 03 (three) months from the date of this Order.

(2) The appellant shall continue to deposit interim monthly compensation @ Rs.30,000/- per month pending

1 AIR 1983 BOMBAY 301.

2 (1998) 8 Supreme Court Cases 676.

the hearing and final disposal of this appeal for ensuing months on or before 10th day of each month.

(3) The appellant shall deposit arrears of rent @ Rs.425/- per month from September 2012 to August, 2016 within a period of two weeks from the date of this order.

(4) The appellant shall continue to deposit rent @ Rs.425/- per moth for every succeeding month on or before 10th day of each succeeding month.

(5) The respondents are at liberty to withdraw the arrears of rent if deposited by the appellant.

(6) Amount of compensation/mesne profits shall be invested in any Nationalized Bank for the period of one year. Period of fixed deposit shall be renewed yearly, if required, by the Registrar of this Court.

(7) The appellant shall furnish an undertaking in the Court that he will not part with possession of the suit premises or create third party interests therein within ten days from the date of this order."

10 From the aforesaid, it is quite clear that by the Order dated 12/08/2016 the respondent No.1 was granted a stay restraining the execution of eviction decree against him subject to certain conditions, *inter alia* to deposit compensation and rent. However, it appears that respondent No.1 failed to comply with

such conditions, and therefore, lost the protection of the interim Order dated 12/08/2016. The respondent No.1 has, since, suffered eviction from the suit premises. The Appeal Court, in such circumstances, has correctly held that the respondent No.1 cannot be vexed twice for the failure of the compliance with the conditions imposed in the Order dated 12/08/2016 as a pre-condition for stay of the eviction decree against him. The Appeal Court has rightly held that such an approach will render the substantive right of appeal nugatory.

11 In *Prabhakar v. Vinayakrao (supra)*, the learned Single Judge of this Court, in the context of Order 39 of Code of Civil Procedure has also held that failure to deposit the decretal amount or furnish security in respect thereof cannot be condition precedent for tenability of an appeal. To the same effect, it is decision of the Honourable Apex Court in the matter of *Kayamuddin Shamsuddin Khan (supra)*.

12 Although there is some merit in the contention of learned Counsel for the petitioner that the said Judgments are in the context of provision of Order 39 of Code of Civil Procedure, the principle involved is not substantially different. In any case, in the facts of the present case, if the Appeal Court has chosen to exercise discretion against denying the respondent No.1 his substantive right to appeal, it can hardly be said that the exercise of such discretion vitiated by unreasonableness so as to warrant

interference in exercise of equatable jurisdiction under Article 227 of the Constitution of India

13 In case if the discretion were to be exercised otherwise, it might have resulted in denying the respondent No.1 his right of appeal merely on the ground that he was unable to deposit compensation amount, which, he was directed to deposit only as a condition for interim relief. This construed, there is no jurisdictional error in the impugned Order.

14 The petition is, therefore, liable to be dismissed and is hereby dismissed.

15 There shall be no order as to costs.

(M.S.SONAK, J.)