

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**935 CIVIL APPLICATION NO.14326 OF 2016
IN SA/728/2016**

Dr. Sidheshwar Vaijnath Pisolé,
Age 58 years, Occupation Doctor
and Agriculturists, R/o N-2, P/2,
15/8, Vitthal Nagar, CIDCO,
Aurangabad.

...Applicant.
(Orig.Plaintiff)

VERSUS

Sominath s/o Bhaurao Vanarase,
Age 39 years, Occupation Doctor,
R/o Pimpri Raje Tq and Dist.
Aurangabad.

...Respondent.
(Orig.Defendant)

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Mr. A. D. Kasliwal, Advocate for Applicant.
Mr. A. S. Shelke, Advocate for Respondent.

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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 11-07-2019.

ORAL ORDER :

1. Present application has been filed for stay to the impugned Judgment and decree passed in Special Civil Suit no.601 of 2008 dated 28-02-2012 and confirmed by First Appellate Court in Regular Civil Appeal No.166 of 2012 dated 19-09-2016. It will not be out of place to mention here that, by order dated 06-02-2019, the appeal has been admitted and the substantial questions of law have been framed. The

second appeal is now waiting for its turn for final hearing. As regards stay application is concerned, since the respondent to this application wanted to give detailed reply, it was not considered on that day and till today the interim was continued.

2. Taking into consideration the fact that the second appeal is admitted, it is not necessary to go into the other details those have been given in the application. Definitely the stay is required to be granted so that the situation which was prevalent at the time of suit and appeal would remain as it is during the pendency of the second appeal also. The only question is as to whether there should be blanket stay or not. For this purpose it is required to be seen that the suit was filed by the present applicant for specific performance of the contract and the respondent had then filed counter claim for possession. The suit was partly decreed. Relief of specific performance was refused. The defendant was directed to pay Rs.40,000/- to the plaintiff at the time of delivery of possession and then the counter claim filed by the defendant was decreed. Plaintiff was directed to hand over the vacant and peaceful possession of the suit property to the defendant. The First Appellate Court dismissed the appeal that was filed by the present applicant. That means, as

on today the decree that applicant is facing is for possession in the main and at the same time he is also agitating regarding refusal of specific performance. The fact which is undisputed is that the present applicant is occupying the suit property.

3. Heard both sides. The learned advocate appearing for the applicant submitted that, taking into consideration the decree that has been passed by the learned Trial Court, inquiry has been ordered in respect of mesne profits and therefore the rights of the present respondent are protected. Taking into consideration all these aspects, this Court had framed the substantial question of law. It is stated that, this Court has made observations regarding the payment of installments those have been made by the applicants. Under such circumstance, when he has made certain payments regarding instalments, there is absolutely no necessity to pass any order regarding payment to be made by the applicant. He relied on the decision in, *Mool Chand Yadav Versus Raza Buland Sugar Company Limited, Rampur, 1982 DGLS (SC) 157*, wherein the Hon'ble Supreme Court observed that,

"But judicial approach requires that during the pendency of the appeal the operation of an order having serious civil consequences must be suspended. More so when

appeal is admitted. Previous history of litigation cannot be overlooked."

By observing this the operation of the order against the appellants therein to hand over the possession of the room to the respondent was suspended.

4. Per contra, the learned advocate appearing for the respondent submitted that, in the detail reply the respondent has stated that, he is paying the installments in respect of the loan taken for the suit property and in order to support the said contention the bank details have been produced which shows that installment of Rs.3767/- is being deposited per month. It was also submitted that as on 12-07-2010 amount of Rs.3,49,971/- was outstanding towards loan account and taking into consideration the deposits those have been made by the respondent till end of February 2019, the respondent has paid Rs.4,13,082/-. It was also submitted that, the appellant is not paying property tax to the Municipal Corporation. Amount of Rs.14,598/- is outstanding towards property tax. So also Rs.30740/- towards water charges. He therefore prayed that, while suspending the decree appellant should be directed to deposit certain amount in this Court.

5. As aforesaid the appeal is admitted and substantial questions of law have been framed. Now as regards execution of the operation of the impugned Judgment is concerned, is required to be stayed, so also the observation in *Mool Chand Yadav's* case are required to be considered. When serious civil consequences are involved then the operation of the order deserves to be suspended. However, the observation in respect of previous history of the litigation is concerned it appears that it was on the basis that the contentions on the merit were submitted and then Supreme Court observed that,

"We are not inclined to examine any contention on merits at present, but we would like to notice of the emerging situation if the operation of the order under appeal is not suspended during the pendency of the appeal."

It appears that, appeal was also filed challenging the contempt action regarding failure to hand over the possession in disobedience of the order of the Court, and taking into consideration that fact the said statement is made that previous history of litigation cannot be overlooked. Rather the Hon'ble Supreme Court specifically states that, previous history of the litigation cannot be overlooked. That means, the history is required to be considered. Under such circumstance, those points which respondent intends to raise now

can be considered here. Though *prima facie* observations have been made by this Court regarding certain payment of installments and substantial question of law in that respect is also framed, yet it can be seen that it was restricted to those installments which the applicant had tried to establish when the evidence was adduced. The question would definitely be whether by merely showing those payments made, whether the further installments towards the loan account have been stopped. The bank account statement of the respondent shows that, he is still paying that amount. When the applicant is enjoying the possession of the property on the basis of the alleged agreement to sell at present and then at the same time he is facing the eviction decree then definitely case is made out not to grant blanket stay. The enjoyment of the property cannot be free of costs. No doubt in the decree that has been passed by the learned Trial Court, separate inquiry has been ordered for the ascertainment of mesne and profits but then it would be at the end of the entire litigation, and therefore, the present is also required to be secured. As regards the outstanding amount of property tax and water tax is concerned, I am not impressed that those amounts will have to be paid by the owner till possession is received. Therefore, with these observations following order is passed.

ORDER

- 1) The application is allowed.
- 2) There shall be stay in terms of prayer Clause 'B' till the final hearing and disposal of the appeal subject to deposit of amount of Rs.2,00,000/- by the applicant in this Court within a period of one (01) month and thereafter he shall go on depositing amount of Rs.4000/- per month till the final hearing and disposal of the second appeal.
- 3) Application stands disposed of accordingly.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-