

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL APPLICATION NO. 2707 OF 2019
IN
FIRST APPEAL NO. 450 OF 2014**

Raj Indrakumar Bhatia

....Applicant

In the matter between :-

Mr. P.A. Pillai (since decd. through legal heirs) :

Omana A. Pillai and ors.

....Appellants

V/s.

Raj Indrakumar Bhatia and anr.

....Respondents

Mr. Pradeep J. Thorat for the applicant in CAF/2707/2019 and
in CAF/2712/2019 and for respondent no.1 in FA/450/2014.

Mr. Ali Kazmi i/b. FF and Associates for respondents / original
appellants.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : 16th OCTOBER, 2019**

P.C.:-

. By order dated 23/02/2016, in Civil Application No. 1445 of 2014, this Court had stayed execution and operation of the impugned judgment and decree dated 03/02/2014. However, liberty was granted to the respondents to take out appropriate application for compensation during pendency of the first appeal in respect of the suit flat.

2. Acting on the liberty granted, the applicant – respondent no.1 herein has filed this application and sought to direct the appellant to deposit compensation @ Rs.18,000/- per month in respect of the suit premises during the pendency of the appeal as a condition precedent for continuation of stay to the operation, implementation and execution of the stay to the judgment and decree dated 03/02/2014 in S.C. Suit No.1690/2003.

3. Heard Mr. P.J. Thorat, the learned counsel for the applicant-respondent no.1 and Mr. Ali Kazmi, the learned counsel for the original appellant. I have perused the records and considered the submissions advanced by the learned counsels for the respective parties.

4. In the case of ***Atmaram Properties (P) Ltd. v/s. Federal Motors (P) Ltd. (2005) 1 SCC 705***, whilst considering the scope of Order 41 Rule 5 of Civil Procedure Code, the Apex Court has held thus :-

“ It is well settled that mere preferring of an appeal does not operate as stay on the decree or order appealed against nor on the proceedings in the court below. A prayer for the grant of stay of proceedings or on the execution of decree or order appealed against has to be specifically made to the appellate Court and the appellate Court has discretion to grant an order of stay or to refuse the same. The only guiding factor, indicated in the Rule 5 aforesaid, is the existence of sufficient cause in favour of the appellant on the availability of which the appellate Court

would be inclined to pass an order of stay. Experience shows that the principal consideration which prevails with the appellate Court is that in spite of the appeal having been entertained for hearing by the appellate Court, the appellant may not be deprived of the fruits of his success in the event of the appeal being allowed. This consideration is pitted and weighed against the other paramount consideration: why should a party having succeeded from the Court below be deprived of the fruits of the decree or order in his hands merely because the defeated party has chosen to invoke the jurisdiction of a superior forum. Still the question which the Court dealing with a prayer for the grant of stay asks to itself is: Why the status quo prevailing on the date of the decree and/or the date of making of the application for stay be not allowed to continue by granting stay, and not the question why the stay should be granted. ”

5. In the instant case, the dispute is in respect of the Flat No.B-5 situated at 2nd floor, B-Wing in Azad Co-operative Housing Society (Prop) Ltd., Kurar Village, Malad (E), Taluka Borivali, Mumbai – 400 097. The said flat shall be hereinafter referred to as ‘the suit premises’.

6. The husband of the respondent no.1 had entered into an agreement with the respondent no.2 to purchase the suit premises. The entire sale consideration in respect of the suit premises was paid to the respondent no.2. It is not in dispute that the appellant herein who was the defendant in the suit had also entered into an agreement with the respondent no.2 for purchase of flat situated on the 3rd floor of C-

wing. The respondent no.1 claimed that the appellant herein had subsequently got the Deed of Confirmation executed wherein the flat was described as flat no.B-5 i.e, the suit premises. The respondent no.1 further alleged that the appellant herein had taken forcible possession of the suit premises.

7. The respondent no.1 therefore filed a suit seeking to direct the respondent no.2 to perform his statutory obligation and further to declare that the agreement and Deed of Confirmation executed by defendant no.1 in her favour as valid and binding. The respondent no.1 also sought recovery of possession of the suit flat and also declaration that the deed in favour of the appellant was illegal, null and void.

8. The respondent no.2 admitted that an agreement for sale was executed in favour of the husband – plaintiff in respect of the suit premises. He has also admitted having received the sale consideration in respect of the suit premises. The respondent no.2 further claimed that he had agreed to sale flat no.C-10 to the appellant and that the appellant had taken forcible possession of the suit premises i.e., flat no.B-5.

9. The appellant claimed that by agreement of sale dated 11/03/1989, he had agreed to purchase flat on the 3rd floor of 'C' building. The appellant claims that the respondent no.2 had wrote to him that due to changes made in the building plan, he was allotted the suit premises i.e., flat no.5 on the 2nd floor of the 'B' building. Accordingly, flat no.B-5 came to be allotted to him and necessary changes came to be made.

10. The Trial Court considered the evidence on record adduced by the respective parties and held that the husband of the respondent no.1 had agreed to purchase the suit premises. He had paid the entire sale consideration. The learned Judge has held that the agreement dated 15/01/1989 and the Deed of Confirmation executed in favour of the husband of respondent no.1 is valid and subsisting. The Trial Court has also recorded a finding that the appellant was to be allotted flat in 'C' wing and that the subsequent agreement of re-allotment between the appellant and respondent no.2 in respect of the suit premises is not legal and not binding upon respondent no.1. The Trial Court has also held that the appellant herein had taken forcible possession of the suit flat. It has been held that the appellant is not legally and lawfully entitled to remain in possession of the suit flat. Based on these

findings, the Trial Court has decreed the suit.

11. The records prima facie indicate that the agreement and Deed of Confirmation executed in favour of the applicant – respondent no.1 was prior in point of time. The husband of the respondent no.1 had paid the entire sale consideration in respect of the suit premises much prior to the execution of the subsequent confirmation in favour of the appellant. The respondent no.2 has asserted that the Appellant has taken forcible possession of the suit premises. Upon appreciating the evidence on record, the Trial Court has observed that the appellant is in unauthorized possession of the suit premises. Having regards to the above facts and circumstances, in my considered view, this would be a fit case to direct the appellant to deposit monthly compensation in respect of the suit premises.

12. Considering the area and location of the suit premises, the appellant is directed to deposit before this Court compensation of Rs.10,000/- (Rupees Ten Thousand) per month from the date of application i.e., 02/02/2019. Arrears from the date of filing of the application till the date of this order to be deposited within a period of four weeks from the date of uploading of this order. The applicant shall

continue to deposit monthly compensation of Rs.10,000/- for the subsequent period on 1st Monday of every month till the disposal of the appeal.

13. It is made clear that in the event the appellant fails to deposit the amount, the interim relief granted by this Court shall stand vacated.

14. Civil Application stands disposed of in above terms.

Preeti
H.
Jayani

Digitally
signed by
Preeti H.
Jayani
Date:
2019.10.25
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(SMT. ANUJA PRABHUDESSAI, J.)