

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.662 OF 2018

IN

CIVIL REVISION APPLICATION (ST.) NO.28204 OF 2017

Rudolf Clothan Lacerda ... Applicant

Vs.

Marietta D'silva and others ... Respondents

Mr. V. S. Kapse a/w. Mr. Upendra Mahadik i/b. Fast Track Legal for Applicant.

Mr. Pradip R. Kadam for Respondents No.1 and 2.

CORAM : R. G. KETKAR, J.

DATE : JANUARY 30, 2019

P.C. :

Heard Mr. Kapse, learned Counsel for the applicant and Mr.Kadam, learned Counsel for the respondents No.1 and 2 at length.

2. This Application is taken out by Rudolf Clothan Lacerda (for short 'Rudolf') inter alia praying for directing the respondent No.1 - Marietta D'silva (for short 'Marietta') to handover vacant and peaceful possession of flat No.2, ground floor, 'Memorare', 16th Road, Chembur, Mumbai - 400 071 (for short 'suit premises') to him.

3. Marietta and respondent No.2 - Melinda Mendes (for short 'Melinda') had instituted R.A.E.Suit No.411/861 of 1996 for recovery of possession of suit premises against - (i) Clothan Lacerda, father of Rudolf, (ii) Mandel Lacerda, uncle of Rudolf and (iii) Immaculate Andarade nee Immaculate Lacerda. It is not necessary to go into details of the case pleaded by the parties. Suffice it to note that by order dated 14.09.2007, the learned trial Judge decreed the Suit and directed the defendants to handover vacant and peaceful possession of the suit premises to the plaintiffs within 3 months from the date of the order

without creating any third party interest over the same in any manner whatsoever.

4. Aggrieved by that decision, Clothan Lacerda and Mandel Lacerda preferred appeal before the Small Causes Court. Clothan was deleted since deceased and Rudolf was brought on record. Mandel also expired. By order dated 25.07.2017, the Appellate Court dismissed the appeal. Aggrieved by these decisions, Rudolf instituted C.R.A.(L) No.28204 of 2017 in this Court. The matter was heard on 23.10.2017 when this Court extended the stay for a period of four weeks. The matter was adjourned to 06.11.2017. On 06.11.2017, it appears that C.R.A. was not listed for admission, and therefore, it was taken on Board. This Court continued the stay until 14.11.2017 and directed listing of C.R.A. on 23.11.2017. By order dated 14.11.2017, the ad-interim stay was continued till 27.11.2017. On 23.11.2017, after hearing both sides, this Court admitted C.R.A. and stayed execution of the decree of possession.

5. The matter was adjourned to 30.11.2017 for fixing interim compensation. On 30.11.2017, respondents No.1 and 2 tendered a valuation report. On behalf of Rudolf, time was sought for considering his position and the matter was adjourned to 08.12.2017. On 08.12.2017, it was adjourned to 20.12.2017. A perusal of orders dated 30.11.2017 and 08.12.2017 shows that ad-interim order was not continued.

6. On 11.04.2018, Marietta and Melinda filed Execution Application No.127 of 2018 for executing the decree passed in R.A.E.Suit No.411/861 of 1996. On 27.04.2018, the executing Court issued possession warrant under Order XXI, Rule 35 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'). On 03.05.2018, Bailiff visited the suit premises and submitted his report at exhibit-22 to the effect that writ of warrant of

possession could not be executed and returned. On 04.05.2018, Marietta and Melinda filed application for taking the matter on Board. On the same day, they filed application exhibit-24 for directing the Bailiff to break open the lock and handover vacant possession to them. By order dated 21.06.2018, the learned trial Judge allowed the application and re-issued possession warrant under Order XXI, Rule 35(1) and (3) of C.P.C. Bailiff Shri. S. G. Rasam was directed to execute the warrant of possession. On 30.06.2018, Bailiff submitted report at exhibit-23 setting out therein that the lock of the suit premises was broken and Marietta was put in possession of the suit premises. On 03.11.2018, Rudolf has taken out present application. On behalf of Marietta and Melinda (respondents No.1 and 2 herein), reply dated 06.12.2018 is filed opposing the application.

7. In support of this Application, Mr. Kapse has taken me through the orders passed by this Court in C.R.A. from time to time. He submitted that after hearing both sides, by order dated 23.11.2017, this Court admitted C.R.A. by issuing Rule. This Court also stayed execution of the decree of possession. Thus, respondents No.1 and 2 are fully aware of admission of C.R.A. as also granting of the stay on the execution of the decree for possession. Respondents No.1 and 2 were therefore, not justified in filing execution proceedings as also in executing the decree and obtaining possession.

8. Mr. Kapse submitted that the cause title of the Suit, Appeal and the Execution Application No.127 of 2018 shows that defendant No.1 - Clothan Lacerda (since deceased) and defendant No.2 - Mandel Lacerda (since deceased) were residing in the suit premises. Defendant No.3 – Immaculate Andarade nee Imaculate Lacerda is residing at Andheri (West). He submitted that defendants No.6, 7 and 8 are the co-owners.

He submitted that Bailiff's reports dated 03.05.2018 at exhibit-22 and dated 30.06.2018 at exhibit-23 show that the Bailiff went to execute writ of warrant of possession against defendants No.3, 6, 7 and 8 at the suit premises. The warrant of possession was, however, not executed against Rudolf, son of defendant No.1, who is brought on record. Thus, the entire action of respondents No.1 and 2 in executing the decree is illegal.

9. Mr. Kapse submitted that the trial Court decreed the Suit on 14.09.2007 and the appeal was dismissed by the Appellate Court on 25.07.2017. Execution Application No.127 of 2018 is filed in April 2018. He submitted that Order XXI, Rule 22 of C.P.C. lays down that where an application for execution is made more than 2 years after the date of the decree, or against the legal representative of a party to the decree, the Court executing the decree has to issue a notice to the person against whom execution is applied for requiring him to show cause, why the decree should not be executed against him. He submitted that the said mandatory provision is admittedly not followed in the present case.

10. Mr. Kapse submitted that a perusal of order dated 23.11.2017 shows that this Court granted stay in the meantime. In other words, the stay was not granted for a limited duration. For all these reasons, he submitted that respondent No.1 may be directed to handover vacant and peaceful possession of the suit premises to the applicant forthwith.

11. On the other hand, Mr. Kadam submitted that no case is made out for granting any of the reliefs claimed by the applicant. He has taken me through the reply filed on behalf of the respondents No.1 and 2. He submitted that the Suit is instituted in the year 1996. The contractual rent @ Rs.301.20/- is deposited in the Court till February 2007. Thereafter, no rent is deposited and the applicant is residing in the suit premises free

of cost. When application was made before the Appellate Court for directing the applicant to deposit the contractual rent, the same was opposed on the ground that the Suit is not for recovery of the rent. He submitted that though during the pendency of the appeal, Rudolf was brought on record after the death of his father - defendant No.1 and shifted to the suit premises, he did not deem it fit to pay the contractual rent of the suit premises. He, therefore, submitted that the conduct of Rudolf dis-entitles him from any relief.

12. Mr. Kadam submitted that a perusal of the order dated 23.11.2017 shows that this Court granted stay till 30.11.2017 only. The stay was thereafter not extended. Rudolf also did not take any steps thereafter for extension of the stay order. Application for execution is filed only in April 2018 complying with all the requirements. He submitted that on 03.05.2018, the Bailiff of the Small Causes Court visited the suit premises when he found the suit premises locked. He made enquiry with the neighbours residing in flats No.1 and 4. Thereafter, again on 29.06.2018, notice was pasted on the suit premises by the Bailiff. He enquired with the neighbours and explained the purpose of his visit and the contents of the warrant of possession. On 30.06.2018, warrant of possession was executed and possession was handed over to the respondent No.1. He submitted that from 03.05.2018 till 30.06.2018, applicant had sufficient time to move this Court for obtaining fresh order of stay. However, no such steps were taken.

13. Mr. Kadam submitted that the reliance on Order XXI, Rule 22 of C.P.C. is misconceived as it is not the case of Rudolf that he was unaware of passing of decree against him. He relied upon the following decisions:

- a. ***Govinda Vs. Sadu*, 2005 (1) Mh.L.J. 651; and**

b. ***Ashok Kumar Vs. State of Haryana, (2007) 3 SCC 470.***

14. Mr. Kadam submitted that in the case of **Govinda** (*supra*), this Court held that the dispossession took place due to the error in the writ issued by this Court. Despite this finding, this Court did not order restoration of possession. He submitted that in the case of **Ashok Kumar** (*supra*), the Apex Court considered passing of interim orders upto a particular period. In the present case, since the interim stay was operating only upto 30.11.2017, respondent No.1 was justified in executing the decree.

15. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As mentioned earlier, the trial Court decreed the Suit on 14.09.2007 and the appeal preferred by defendants No.1 and 2 was dismissed by the Appellate Court on 25.07.2017. Aggrieved by these decisions, Rudolf filed C.R.A. The parties were heard by this Court on 23.10.2017, 06.11.2017 and 14.11.2017. In the order dated 23.10.2017, this Court noted that by order dated 28.11.2017, the Appellate Court extended the stay to the effect and operation of the order dated 10.12.2007 passed in R.A.E.Suit No.411/861 of 1996. In view thereof, this Court extended the stay by further period of 2 weeks i.e. till 06.11.2017 and directed listing of the Petition for 'admission' on 06.11.2017. On 06.11.2017, C.R.A. was not on Board and as the stay expired on 06.11.2017, the stay was ordered to continue until 14.11.2017. On 14.11.2017, the ad-interim stay was extended till 27.11.2017 and matter was directed to be listed on 23.11.2017. On 23.11.2017, after hearing both sides, this Court admitted the C.R.A. and granted stay on execution of the decree for possession. Paragraph 4 of the order reads thus,

“4. **In the meantime, until 30th November 2017** there will be a stay on execution of the decree for possession. On that date, both sides will be entitled to place material in support of their respective contentions as to the interim compensation that should be fixed.

(emphasis supplied)”

16. A perusal of paragraph 4 of the above order clearly shows that this Court granted stay on execution of the decree for possession. It was adjourned to 30.11.2017 for consideration of fixation of the interim compensation. Mr. Kapse submitted that the stay was granted in the meantime thereby meaning that until further orders, the stay will remain in force. As against this, Mr. Kadam submitted that the stay was granted only upto 30.11.2017 and was thereafter not extended. It is, therefore, necessary to resolve this controversy.

17. In the case of **Govinda** (*supra*), the learned Single Judge considered the phrase “in the meanwhile” and observed in paragraphs 12 and 13 thus,

“12. In view of this controversy, the question is whether the possession should be restored to the Appellants. Before I consider this question, it is necessary to consider the main controversy whether the stay granted by this Court was operative only till the returnable date i.e. 9th December 2002, or it was to continue till disposal of the Civil Application or till further orders. The first part of the order records that the notice is issued to the Respondents and 9th December 2002 is fixed as the returnable date of the notice. From the plain reading of the order, it is very clear that the order of ad-interim stay was not limited to any particular date. The first part of the order directs issuance of the notice to Respondents and it is ordered to be made returnable on a particular date. It is further stated that in the meanwhile ad-interim exparte relief is granted. It is crystal clear from the order that the intention of this Court was to issue notice and to grant stay in the meanwhile. The phrase "in the meanwhile" is used in the order granting stay. The dictionary meaning of the word meanwhile is "till happening of a particular even" or "until something expected happens". When the stay was to be operative in the meanwhile, it was to operate upto happening of a particular

event. The said event was hearing of the application after service of notice to the Respondents. Whenever this Court intends to grant ad-interim relief limited to a particular date, it is always mentioned in the order very specifically that the ad-interim relief will be operative till a particular date. When this Court issued notice and granted ad-interim relief in the meanwhile, it was obviously intended that the ad-interim relief will operate till the application was heard by this Court after service of notice. When this Court makes notice returnable on a particular date, it cannot be argued that the date mentioned in the notice is the date on which the application will be positively heard. The returnable date mentioned in the order is the returnable date fixed for the notice. It is a date fixed for appearance of the parties. It is not necessary that on the returnable date fixed by this Court, the case appears on the Board. When this Court issued notice to the Respondents and granted ad-interim relief "in the meanwhile", it is obvious that the ad-interim relief was to operate till the Court heard the parties on the basis of the notice issued or till order of stay was specifically vacated by this Court. Whenever, the Court intends that the ad-interim relief will operate till the returnable date, it is specifically mentioned in the order that ad-interim relief will operate upto a specific date or till the returnable date of notice. When ad-interim relief is granted "in the meanwhile" after issuance of notice to the Contesting Party the said relief continues to operate until the event of hearing of the Application. The order cannot be read to mean that the interim relief is operative only till the returnable date of the notice.

13. It is thus clear that in the present case the ad-interim relief granted by this Court was to operate till disposal of the application or till further orders. The dispossession has taken place because of last portion of the writ which was issued by the office of this court. However, the order passed by this Court was quoted as it is in the writ. It appears that the Revenue authorities were misled by the last part of the writ and the execution was completed. Writ of the order of this Court is issued for communicating the order of this Court to the Sub-ordinate Courts. Therefore, the Court must act as per the order of this Court when is exactly reproduced in the writ."

18. Mr. Kadam submitted that this Court did not restore possession despite recording finding that there was error in the writ issued by this Court. In paragraph 15, after recording that dispossession took place due

to the error in the writ issued by this Court, this Court noted that appellants were not ignorant about pending proceedings before the Tahsildar for taking possession. The Panchanama bore signature of the son of appellant No.1 and therefore it is apparent that the appellants were aware about the fact that a date was fixed for taking possession. This Court further noted that there was nothing on record to show that any effort was made by the appellants to bring to the notice of Tahsildar the order of stay granted by the Court. After possession was taken, crop had already come up on the suit land. That apart, the parties were related. In such circumstances, this Court found it unjust at that stage to disturb the possession of the respondents.

19. In the case of **Ashok Kumar** (*supra*), in paragraph 2, the Apex Court noted the order of interim injunction issued on 30.08.1997 and subsequent extension of that order on 24.09.1997. On 29.11.1997, the following order was passed:

" ... The case is adjourned to 09.01.1998 for filing of written statement and reply to the injunction application. Till then stay order dated 30.8.98 is extended."

20. Yet again, by an order dated 09.01.1998, the stay order was extended till 23.03.1998. Similar order was passed on 23.03.1998. The matter was adjourned from time to time and ultimately on 09.09.1998, order of injunction was not extended. In paragraphs 11 and 12, it was observed thus,

"11. The short question which arises for consideration in this appeal is as to whether the order of ad interim injunction granted by the learned Civil Judge, Senior Division, Panipat, was operative till 09.09.1998 or 19.08.2000. We have noticed hereinbefore the nature of the orders passed by the learned Civil Judge. Although in its order dated 30.08.1997, the learned Civil Judge, used the term "In the meantime", which was repeated in its order

dated 24.09.1997, but in the subsequent orders beginning from 29.11.1997, the expression used was "till then".

12. The term of the order of the learned Judge, in our opinion, does not leave any manner of doubt whatsoever that the interim order was only extended from time to time. The interim order having been extended till a particular date, the contention raised by the respondents herein that they were under a bona fide belief that the injunction order would continue till it was vacated cannot be accepted.”

21. I have already extracted paragraph 4 of the order dated 23.11.2017. A perusal of orders dated 23.10.2017, 06.11.2017 and 14.11.2017 clearly shows that the ad-interim stay was extended upto a particular date. In so far as the order dated 23.11.2017 is concerned, a careful reading of paragraph 4 of that order leaves no room for doubt that this Court did not grant **ad-interim stay** but **granted interim stay**. On 23.11.2017, this Court, after hearing both sides, admitted C.R.A. by issuing Rule. It was kept on 30.11.2017 when both sides were to place material in support of their respective contentions as to the interim compensation that that should be fixed. In other words, on 30.11.2017, matter was kept for fixation of interim compensation. The decisions relied by Mr. Kadam do not deal with the wordings employed in paragraph 4 of the order dated 23.11.2017. In paragraph 4, this Court observed that “In the meantime, until 30th November 2017 there will be stay ...” . In my opinion, the words “in the meantime” and “until 30th November 2017” cannot go hand in hand. In my opinion, the purport of the order dated 23.11.2017 passed by this Court is absolutely clear and explicit. If the contention of Mr. Kadam is accepted that the interim stay was only upto 30.11.2017, and thereafter it stood vacated is accepted, it will render C.R.A. infructuous thereby permitting respondents No.1 and 2 to execute the eviction decree. Even otherwise, it is settled principle of law that because of the mistake committed by the Court, litigant should not suffer. The wording employed in paragraph 4 of the order dated

23.11.2017, if I am permitted to say so, with respect, was not correct. Once the learned Judge used the expression 'in the meantime', in view of the decision of this Court in **Govinda** (*supra*), it cannot be limited upto a particular date.

22. Mr. Kadam submitted that in view of the conduct of Rudolf, he is not entitled to any relief as from March 2007, contractual rent @ Rs.301.20/- is not deposited. In my opinion, this grievance should have been made by the respondents No.1 and 2 when this Court admitted the C.R.A. and granted stay. Be that as it may. Having regard to the facts and circumstances of the present case, I am of the opinion that respondents No.1 and 2 were not justified in filing the execution proceedings and executing the decree. Respondents No.1 and 2 cannot be heard to say that they were unaware of admission of C.R.A. and granting stay. Respondents No.1 and 2 could have moved this Court seeking permission to execute the decree if they were under impression that stay expired after 30.11.2017. Even that course was not adopted by them. In view thereof, applicant-Rudolf is entitled to restoration of possession in terms of prayer clause (a) of the Civil Application subject to the condition of depositing contractual rent @ Rs.301.20/- per month from March 2007 till date and continuing to deposit that amount during the pendency of C.R.A. in addition to the interim compensation. Civil Application is accordingly disposed of.

23. At this stage, Mr. Kadam orally applies for stay of this order for a period of 12 weeks from today. Though respondents No.1 and 2 have taken possession high-handedly, considering the fact that they intend to challenge this order in superior Court, this order shall not be given effect for a period of 4 weeks from today with express understanding that no further extension shall be sought for and granted by this Court. It is

expressly made clear that this Court has not stayed direction to the applicant to deposit contractual rent @ Rs.301.20/- from March 2007 onwards. In the meantime, respondents No.1 and 2 shall neither create third party interest nor part with possession. Order accordingly.

(R. G. KETKAR, J.)

Minal Parab