

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

**CIVIL APPLICATION NO. 1206 OF 2018
IN
FIRST APPEAL NO. 1148 OF 2018**

Neera Handa and ors.Applicants

V/s.

Morarji Hariram (since deceased through
legal heirs) :

Nirmalaben Morarji Thakkar and ors.Respondents

Mr. Prashant G. Karande for the applicants/appellants.

Mr. Girish Godbole a/w. Mr. Prathamesh Kamat a/w.

Ms. Sarika Mehra i/b. L.J. Law for respondent nos.1 to 3.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : 27th AUGUST, 2019**

P.C.:-

. The applicant / appellant has sought to stay execution and implementation of the impugned judgment and decree dated 07/10/2017 in Suit No.7485/2005.

2. By the impugned judgment, the City Civil Court, Gr. Bombay has directed the applicant to hand over vacant and peaceful possession of Room No.22 in the building Kutchi House, 17, Brahmanwada Road, Matunga, Mumbai to the respondents within six months from the date of the decree with further direction to pay an amount of Rs.2,500/- per month with interest at the rate of 8% p.a. from the date of decree till handing over of the possession.

3. The learned counsel for the applicant states that in compliance with order 05/04/2018, the applicant has deposited before the Court a total amount of Rs.4,42,000/- towards arrears and interest from the date of the suit till the date of the order i.e., 13/08/2018. In addition, the applicants are depositing Rs.2,500/- every month. He states that the RAD Suit No.1277/2008 filed by the applicants is pending before the Small Causes Court, Mumbai. He submits that the applicant will suffer substantial loss if she is dispossessed from the suit room during the pendency of the appeal.

4. Per Contra, Mr. Girish Godbole, the learned counsel for the respondent nos.1 to 3 submits that the trial Court has recorded a specific finding that the applicant is a trespasser. He submits that the applicant should be put to terms before granting stay to the decree of possession. He submits that the applicant should be directed to deposit Rs.32,000/- per month as per the valuation obtained by the applicant, as the fair and reasonable market rate.

5. In ***Atmaram Properties (P) Ltd. V/s. Federal Motors (P) Ltd. (2005) 1 SCC 705***, the Apex Court whilst considering the scope and powers of the Appellate Court under Order 41 Rule 5 of the Civil Procedure Code, held that :-

“8. 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.

9. Dispossession, during the pendency of an appeal of a party in possession, is generally considered to be 'substantial loss' to the party applying for stay of execution within the meaning of clause (a) of sub-rule (3) of Rule 5 of Order 41 of the Code. Clause (c) of the same provision mandates security for the due performance of the decree or order as may ultimately be passed being furnished by the applicant for stay as a condition precedent to the grant of order of stay. However, this is not the only condition which the appellate Court can impose. The power to grant stay is discretionary and flows from the jurisdiction conferred on an appellate Court which is equitable in nature. To secure

an order of stay merely by preferring an appeal is not the statutory right conferred on the appellant. So also, an appellate Court is not ordained to grant an order of stay merely because an appeal has been preferred and an application for an order of stay has been made. Therefore, an applicant for order of stay must do equity for seeking equity. Depending on the facts and circumstances of a given case an appellate Court, while passing an order of stay, may put the parties on such terms the enforcement whereof would satisfy the demand for justice of the party found successful at the end of the appeal.

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18. 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 tenant-appellant 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 justification for the appellate Court to put the tenant-appellant 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. In Marshall Sons & Co. (I) Ltd. Vs. Sahi Oretrans (P) Ltd. & Anr., (1999) 2 SCC 325, this Court has held that once a decree for possession has been passed and execution is delayed depriving the judgment- creditor of the fruits of decree, it is necessary for the Court to pass appropriate orders so that reasonable mesne profits which may be equivalent to the market rent is paid by a person who is holding over the property.

19. To sum up, our conclusions are:-

(1) while passing an order of stay under Rule 5 of Order 41 of the

Code of Civil Procedure, 1908, the appellate Court does have jurisdiction to put the applicant on such reasonable terms as would in its opinion reasonably compensate the decree-holder for loss occasioned by delay in execution of decree by the grant of stay order, in the event of the appeal being dismissed and in so far as those proceedings are concerned. Such terms, needless to say, shall be reasonable. ”

7. In the instant case, the applicant has suffered decree of eviction. The applicant who claims to be the tenant, has filed a declaratory suit i.e. RAD Suit No.1277/2008 which is pending before the Small Causes Court, Gr. Bombay. Execution of the impugned judgment and decree will result in dispossessing the applicant during the pendency of the appeal and will cause substantial loss to the applicant. Hence, execution of the impugned judgment is required to be stayed by putting the applicant to terms. The applicant has been depositing Rs.2,500/- per month. Considering the location and area of the suit room, it would be just and proper to direct the applicant to deposit Rs.12,000/- per month from the date of filing of the appeal i.e. 12/12/2017 till final disposal of this appeal or RAD Suit No.1277/2008 whichever is earlier. Hence, the following order :-

(a) Execution of clause (2) of the impugned judgment and decree dated 07/10/2017 in Suit No.7485/2005 is stayed till the disposal of the appeal subject to the appellants depositing Rs.12,000/- per

month from the date of filing of the appeal i.e. 12/12/2017 till final disposal of the RAD Suit No.1277 of 2008 which is pending before the Small Causes Court, Mumbai whichever is earlier.

(b) The arrears from the date of the appeal till the date of this order to be deposited within a period of six months from the date of uploading of this order and further payment to be made on or before 7th day of every month.

(c) The respondents are at liberty to withdraw the said amount on giving an undertaking to refund the amount with interest in the event the appellants are held to be the tenants in Suit No.7485/2005. Such undertaking shall be filed in the Registry on the date of withdrawal of money.

8. Civil Application stands disposed of.

(SMT. ANUJA PRABHUDESSAI, J.)