

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

APPEAL FROM ORDER NO. 257 OF 2022

Shenaaz Ansari Bano

...Appellant

V/s.

Asif Shaikh

...Respondent

Mr. Sachin Subhash Tigde, for the Appellant.

None for the Respondent.

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CORAM : C.V. BHADANG, J.

DATE : 5 AUGUST 2022

P.C.

. The challenge in this appeal from order, is to the order dated 1 September 2021 passed by the learned District Judge, Kalyan in Regular Civil Appeal No.27/2020. By the impugned order, the application (Exh.5) for stay filed by the Appellant under Order XLI Rule 5 of the Civil Procedure Code, has been allowed. As a result of the same, the Appellate Court has granted stay to the judgment and decree dated 10 February 2020 passed by the learned Joint Civil Judge, Senior Division, Kalyan in Special Civil Suit No.378/2013, subject to the Appellant depositing compensation of Rs.5,000/- per month from October 2013. The Appellant is aggrieved by the part of the order directing the Appellant to deposit the compensation as aforesaid.

2. At the outset, it is necessary to note that this was initially filed as a Writ Petition No.2577/2022. As per order dated 7 March 2022, passed by this Court (Nitin W. Sambre, J.), the appeal was converted into an appeal from order. This Court placing reliance on *Shivaji Shankar Jadhav Vs. Laxman Gajanan Godbole*¹ had found that the appeal from order would be maintainable. In *Shivaji Shankar Jadhav*, the Division Bench of this Court has held that an order passed by the Appellate Court in an Appeal under Section 96 of the Code granting injunction under Order XXXIX Rule 1 & 2 would be appealable under Order XLIII. Strictly speaking, the order challenged in this case is not of granting injunction but of stay which is essentially passed under Order XLI Rule 5 of the Code.

3. Be that as it may, I have heard the learned counsel for the Appellant. None appears for the Respondent. Perused record.

4. The learned counsel for the Appellant submitted that the Appellant has no financial means to deposit the amount. He submitted that the conditional stay could not have been granted. He submitted that in the event the amount is not deposited, the Appellant is likely to lose, possession of the suit premises. Except, the financial inability of the Appellant to comply with the impugned order, no other contentions are raised.

¹2019(3) Mh.L.J. 767

5. I have considered the submissions made.

6. Normally, a decree for delivery of immovable property is stayed subject to the condition of deposit of the monetary part of the decree and an order for directing payment of certain amount towards means profits / compensation. In this case, a perusal of the judgment and decree dated 10 February 2020 passed by the learned Joint Civil Judge, Senior Division in Special Civil Suit No.378/2013 (which decree is subject matter of challenge in Regular Civil Appeal No.27/2020) shows that the Appellant (original Defendant No.1) has been directed to delivery vacant possession of the suit flat to the Respondent – Plaintiff and to pay compensation of Rs.5,000/- per month from October 2013 till handing over possession alongwith interest @ 10% per annum. The learned District Judge has stayed the decree subject to payment of Rs.5,000/- per month which order, in my view, does not exhibit any infirmity so as to require interference. The appeal is without any merit and is accordingly dismissed, with no order as to costs.

C.V. BHADANG, J.