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

**WRIT PETITION NO.1104 OF 2020**

**WITH  
WRIT PETITION NO.4925 OF 2023**

Shivprasad Mohanlal Tiwari & Anr. ... Petitioners

**V/s.**

Pravin Jeevraj Khandelwal & Anr. ... Respondents

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Mr. Ravi G. Shinde, for petitioner.

Mr. Rishikesh M. Pethe, for respondent Nos.1 & 2.

**CORAM : AMIT BORKAR, J.**

**DATED : NOVEMBER 1, 2023**

**P.C.:**

1. Challenge in the writ petitions is to the order passed by the Appellate Court in exercise of power under Order 41, Rule 5 of the Code of Civil Procedure, 1908 granting stay to the decree for possession arising out of counter claim filed by petitioner in a suit for specific performance.

2. The respondent/original plaintiff filed Special Civil Suit No.1284 of 2006 for specific performance of agreement to sell dated 17 September 2003 in the said suit, along with written statement.

3. The petitioner filed counter claim seeking possession of suit property.
4. The Trial Court by the judgment and decree dated 30 January 2019 dismissed the suit. However, the Trial Court decreed the counter claim directing plaintiffs to hand over possession of the suit property to the defendants within two months from the date of judgment.
5. Aggrieved by dismissal of suit and grant of counter claim, the respondent filed Regular Civil Appeal No.255 of 2019. In the said appeal, the respondent applied for stay to the execution of decree for possession. While hearing the said application, the petitioner applied for direction to grant him compensation during pendency of appeal relying on the judgment of Apex Court in the case of **M/s Atma Ram Properties Pvt. Ltd. Versus M/s. Federal Motors Pvt. Ltd.**, reported in (2005) 1 SCC 705.
6. The Appellate Court by the impugned order dated 2 December 2019 granted stay to the decree for possession; however, refused to grant compensation holding that the judgment of **M/s Atma Ram Properties** (supra) arises between landlord and tenant and the relief prayed by the petitioner is available to him by way filing of appeal after decision of the suit.
7. Learned Advocate for the petitioner relying on the judgments in the cases of **M/s Atma Ram Properties Pvt. Ltd. Versus M/s. Federal Motors Pvt. Ltd.**, reported in (2005) 1 SCC 705, **State of Maharashtra & Anr Versus M/s Super Max International Pvt. Ltd. & Ors.**, reported in (2009) 9 SCC 772, **M/s Super Max International**

**Pvt. Ltd. & Ors Versus State of Maharashtra & Anr.**, reported in 2009 (2) MHLJ 134, **South Eastern Coalfields Ltd. Versus State of M. P. & Ors.**, reported in (2003) 8 SCC 648, **Chandrakant Dhanu Versus Sharmila Kapur**, reported in 2009 (2) MH. L.J. 243, and **Odisha Forest Development Corporation Ltd. Versus Anupam Traders and Ors.**, reported in 2019 SCC Online SC 1524, submitted that the status of respondent (plaintiff) remains to be that of trespassers and, therefore, the petitioner being owner of the property cannot be deprived of the fruits of the decree for possession. Hence, the appellate Court has power under Order 41, Rule 5 of the Code of Civil Procedure, 1908. According to him, the Supreme Court in the case of **M/s Atma Ram Properties** (supra) has laid parameters of exercising powers by the Appellate Court under Order 41, Rule 5 of CPC and therefore, such power enables the Appellate Court to grant compensation irrespective relationship of parties whenever decree for possession is passed.

8. Having considered, the nature of suit filed against the respondent, it appears that the suit is based on an agreement to sell allegedly executed by the petitioner in favour of the plaintiff. The Trial Court dismissed the suit and allowed the counter claim of possession. While dismissing the suit of the plaintiff, the Trial Court answered the issue to proof of agreement to sell in the negative. With the result the said suit was dismissed. However, the defendant was held to be entitled for possession based on his right of ownership . The question, therefore, arises for consideration is as to whether the Court under Order 41, Rule 5 of CPC can direct the party to the suit against whom decree for possession is passed

by the Trial Court irrespective nature of relationship between the parties.

9. To decide this issue, it is necessary to consider the facts of **M/s Atma Ram Properties** (supra) properties suit. In the said facts the appellant was owner of non-residential premises which was let out to the respondent for monthly rent of Rs.371.90 since 1944. The Trial Court granted the decree. The Apex Court was of opinion that the respondent was inducted in the premises for monthly rent of Rs.371.90 since 1944 and the value of real estate and rent rates have skyrocketed since that day, the order passed by the Tribunal directing the tenant to pay rent at market rate was upheld.

10. The rationale behind adopting such view in the matters under Rent Act is the scheme of Rent Control Act which freezes rent of tenant on the date of commencement of the Act or when the premises was first let out to the tenant. The Apex Court, therefore, has taken view that once there is decree for possession passed against the tenant the status of such tenant after the decree will be that of trespasser and therefore, during pendency of appeal, protection as regards payment of rent is lifted and such protection shall be subject to discretion of the Appellate Court. The Appellate Court in exercise of power under Order 41, Rule 5 of CPC is entitled to put tenant on terms and direct the tenant to compensate the landlord by payment of a market rent which is not necessarily the same as the contractual rate of rent. Ordinarily, such tenant against whom decree for possession is passed is directed to pay rent at market rate during pendency of the appeal.

Delivery of possession is protected by the Appellate Court. Therefore, the statutory tenant who gets protection of Rent Act, was pays the standard rent or the rent fixed by the parties on the date of entering into premises as tenant. Accordingly, adopted such relationship of landlord and tenant cannot be extended to the suit for specific performance particularly when the appeal arises out of Trial Court's decree under Section 96 of CPC is subject to scrutiny on facts and on law.

**11.** In a suit for specific performance, the remedy of owner of the premises to claim damages/compensation at market rate is recognised by existing provisions of CPC in the form of Order 20, Rule 12 of CPC. The forum to seek such relief of compensation at market rate is provided under the existence of provisions of CPC. By refusing to grant relief, the Appellate Court has postponed adjudication on the quantum of amount to be paid by the person who is in unlawful possession subject to further decision by the Superior Courts. If ultimately, the decree attains finality, it shall be open for the owner to prove amount of compensation which the property could fetch during pendency of proceedings. Therefore, in my opinion, no fault can be found that the judgment of the lower Court. Hence, There is no merit in the writ petitions. Hence, both the writ petitions stand dismissed. No costs.

**(AMIT BORKAR, J.)**