

VRJ

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

**INTERIM APPLICATION NO.19985 OF 2022
IN
FIRST APPEAL NO.859 OF 2019**

Reshma Estates Private Limited ... Applicant

V/s.

Shivangi Shanker, Shri Ashwini Shanker
& Anr. ... Respondents

Mr. Cherag Balsara a/w Mohit Arora with Akshay
Doctor with Aman Arora i/by Desai & Diwanji for the
applicant.

Mr. Atul Damle, senior advocate with Uma Sharma i/by
Dharam & Co. for the respondents.

CORAM : AMIT BORKAR, J.

DATED : JANUARY 18, 2023

RC.:

1. This application filed by the appellant/original defendant seeking stay of impugned judgment and decree dated 7th December 2018 passed by the learned Trial Court.

2. The applicant had initially filed Civil Application No.2863 of 2019 along with first appeal. This Court by order dated 15th October, 2019 admitted the appeal and permitted the applicant to withdraw the application with liberty to file fresh application on separate cause of action.

3. In pursuance of the liberty granted by this Court, the applicant filed second application bearing Interim Application No.1 of 2019. This Court by order dated 12th March 2020 rejected the application holding that the apprehension expressed by the applicant that the opponents would create third party rights in relation to the suit property may not create impediment considering clause 3 of the operative part of the order.

4. The applicant has now filed third application under Order 41 Rule 5 of the Code of Civil Procedure, 1908 seeking relief of stay of the impugned judgment and decree. It is submitted on behalf the applicant that on 15th October, 2019 this Court permitted the applicant to file a fresh application on separate cause of action and accordingly second application was filed. The second application was rejected without going into merits of the case. Therefore, according to the applicant, third application is maintainable. According to the applicant cause of action for filing third application occurred only when execution application was served on the applicant after the rejection of second application. It is submitted that the principal of *res judicata* would not apply as the earlier applications were not decided on merits of the case.

5. Relying on the judgment in the case of **M/S. Atma Ram Properties (P) Ltd vs M/S. Federal Motors Pvt. Ltd** reported in 2005 1 SCC 705, it is submitted that service of notice of execution application would amount of sufficient cause within the meaning of Order 41 Rule 5. Relying on the observations made in paragraph 8 and 9, it is submitted that the purpose of considering application under order 41 rule 5 is to maintain status

quo prevailing on the date of passing of decree and refusal to grant stay to the impugned decree would result in miscarriage of justice. It is submitted that ordinarily in an appeal challenging decree of specific performance, stay of decree is a matter of rule and rejection is exception.

6. *Per contra*, on behalf of the opponent it is submitted that this Court having rejected earlier application for same relief, present application is not maintainable. Inviting my attention to paragraph 12 and 13 of the second application, it is submitted that the applicant had pleaded case on merits and mere non-consideration of the same in the order dated 12th March, 2020 would not entitle the applicant to file third application.

7. I have given anxious consideration to the submissions made on behalf of both the sides. It is well settled position of law that in a substantive appeal granting decree for specific performance, ordinarily interim relief for stay needs to be granted. The decree for specific performance is exercise of discretion depending on various factors. The substantive rights of parties in relation to immovable property are involved and, therefore, the Appellate Court would be loath to reject such application for stay of decree. However, in the facts of the case this Court by order dated 15th October, 2019 permitted the applicant to file fresh application on separate cause of action. In the second application, the applicant in paragraph 7 pleaded that the execution petition was filed and the applicants were not served with the same. In paragraph 12 and 13 the applicant raised grounds on merits. On perusal of order dated 12th March 2020, it appears that the Court was considering

apprehension that sale of flat in the building may hamper rights of the applicant. Rejecting such submission, this Court observed that direction in paragraph 3 of the operative part of the impugned judgment takes care of the apprehension expressed and, therefore, rejected the interim application. In my opinion, rejection of such application would be denying relief of stay to the applicant. Merely because the Court while rejecting such application had not considered grounds raised in paragraphs 12 and 13 of the application, it would not create right in favour of the applicant to file fresh application. Doctrine of finality to the litigation applies to interlocutory/interim applications also.

8. While considering interlocutory applications/interim applications under Order 39 Rule 1 and 2, Order 38 Rule 5, Order 40 Rule 1 filed during pendency of appeal, the Court would certainly be guided by the factors arising after the delivery of judgment and the Appellate Court would not be powerless to consider grant relief in such applications. However, while considering application under Order 41 Rule 5, the consideration which would weigh with the Appellate Court is the merits of the case. Subsequent events occurred after delivery of judgment would not impact on the scope of inquiry under Order 41 Rule 5.

9. Once earlier application has been rejected by the co-ordinate bench, knowledge of execution proceedings would not, in my opinion, entitle the applicant to file fresh application under Order 41 Rule 5.

10. The judgment in the case of **M/s. Atma Ram Properties**

(P) Ltd. (supra) arose out of the proceedings under Rent Control Act. The Court was considering rights of the tenant whose tenancy was determined by decree of Court. The capacity of tenant to hold property, after the determination of tenancy by decree of Court, would be that of trespasser. Therefore, while balancing equities, the Apex Court was considering rights of a person in possession of immovable property facing eviction and rights of a landlord whose property is in possession of a trespasser. To balance equities, the Apex Court issued certain directions for fixing of market rate as measure to compensate the landlord. In the facts of present case, the issue involved is whether second application under Order 41 Rule 5 is maintainable, once such application has been rejected by the same Court. In the context of the said issue, in my opinion the judgment in the case of **M/S. Atma Ram Properties (P) Ltd** (supra) is of no help to the applicant.

11. In the case of **Erach Boman Khavar vs. Tukaram Shridhar Bhat & Anr.** reported in (2013) 15 SCC 655, the Apex Court was considering second interlocutory application filed by a party before Trial Court once earlier application was rejected. The Apex Court relying on the earlier judgment in the case of **Arjun Singh vs. Mohindra Kumar** reported in AIR 1964 SC 993 held that distinct principle of finality of order would not apply to the interlocutory orders as such orders are certainly capable or altered or varied by subsequent applications for the same relief, though normally on proof of new facts or new situations which subsequently emerged. Such orders are necessary for preservation of property pending final adjudication. There cannot be dispute

about the position of law laid down by the Apex Court but in the facts of the case, the application is under Order 41 Rule 5, not under Order 39 Rule 1 or Order 41 Rule 1. Subsequent cause of action may entitle the party in the facts of the case, to file an application under Order 39 Rule 1 and 2. If the cause of action accrues after rejection of first application, it entitle party to seek such relief. However, analogy of interim/interlocutory application under Order 39 Rule 1 or Order 40 Rule 1 and 2 cannot be imported while deciding application under Order 41 Rule 5 as the scope of inquiry in both the applications is distinct and independent. While considering application under Order 39 Rule 1 and 2, the court is necessarily guided by the principle of *prima facie* case, irreparable loss and balance of convenience. However, while considering application under Order 41 Rule 5 the Court is guided by the principle of substantial loss in the context of merits of the case.

12. Absence of reasons as regards merits of the case would not entitle the applicant to file fresh application, particularly in view of the grounds on merits pleaded in the application. Remedy of such applicant is to challenge such order before the superior Court and not to file separate application.

13. In that view of the matter, in my opinion, The application under Order 41 Rule 5 is not maintainable. Since the application is not maintainable, this Court is not considering merits of the case pleaded by the applicant.

14. For the aforesaid reasons, interim application 19985 of 2022

stands rejected.

15. Since the ad-interim relief was in force in favour of the applicant from 23rd November, 2022, the same is extended till 15th March, 2023.

(AMIT BORKAR, J.)