

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

CO 334 of 2022

Sk. Golam Lal Chand
Vs.
Raihan Mullick

Mr. Kushal Chatterjee
Mr. Debrup Choudhury
... For the petitioner

Mr. Somnath Roy Chowdhury
... For the opposite party

1. This revisional application has been filed challenging the order dated 31st January, 2022 passed in connection with Title Appeal No.219 of 2019 whereby the learned Additional District Judge, Fast Track Court-II, Howrah Sadar, passed an order staying operation of the judgment and decree passed by the learned Civil Judge (Junior Division), 7th Court at Howrah in connection with Title Suit No.246 of 2012 while disposing of an application for stay of execution as well as one application under Order XLI Rule 5 of the Code of Civil Procedure (in short, CPC).

2. Learned counsel appearing on behalf of the petitioner has submitted that the Learned Trial Judge stayed the operation of the judgment and decree on an application filed on behalf of the opposite party herein in respect of one application for stay of all further proceeding in connection with Title Execution Case No.108 of 2019, pending before the Learned Appellate Court, but the

learned Trial Judge disposed of both the applications together and ultimately stayed the operation of the judgment and decree passed in Title Suit No.246 of 2012.

3. Learned counsel appearing on behalf of the petitioner has drawn my attention to the order passed by the Co-ordinate Bench of this Court in connection with CO 1310 of 2020 wherein the Co-ordinate Bench directed the Learned Appellate Court to hear out the application under Section 5 of the Limitation Act and if the application for condonation of delay is allowed, then the petitioner shall file objection to the stay application immediately and the application for stay shall be proceeded with by the learned Court by giving an opportunity of hearing to all.

4. In support of his contention, learned counsel appearing on behalf of the petitioner takes assistance of a case of **M/s. Atma Ram Properties (P) Ltd. v. M/s. Federal Motors Pvt. Ltd.** reported in **(2005) 1 SCC 705**, particularly the observation made in paragraphs 18 and 19, which run as follows:-

“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;

(2) in case of premises governed by the provisions of the Delhi Rent Control Act, 1958, in view of the definition of tenant contained in clause (l) of Section 2 of the Act, the tenancy does not stand terminated merely by its termination under the general law; it terminates with the passing of the decree for eviction. With effect from that date, the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. The landlord is not bound by the contractual rate of rent effective for the period preceding the date of the decree;

(3) the doctrine of merger does not have the effect of postponing the date of termination of tenancy merely because the decree of eviction stands merged in the decree passed by the superior forum at a latter date.”

5. Learned counsel appearing on behalf of the opposite party has tried to make this Court understand that the tone and tenor of both the applications for stay of execution as well as the stay of the judgment and decree of

the Title Suit No.246 of 2012 are synonymous. In support of his contention, he relies on paragraph 8 of the judgment of **Atma Ram Properties (P) Ltd.** (supra) which runs as follows: -

“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.”

6. Learned counsel appearing on behalf of the opposite party further relies on the judgment of **Smt. Kumkum v. Arvinder Singh Bagga @ Bablu & Ors.** reported in **2014 0 Supreme (All) 2017**, particularly paragraphs 2 to 8, which run as follows:-

“2. Petitioner is aggrieved by the order dated 31.3.2014 passed by the appellate court disposing of application paper No.13-Ga in Civil Appeal No.95 of

2013, Nav Kalpna Sahkari Avas Samit and another v. Smt. Kumkum and others.

3. It appears that the petitioner had instituted a suit for a decree of permanent injunction. The said suit was decreed vide judgment and order dated 20.5.2013 restraining the defendants to the suit from interfering in the possession and ownership of the petitioner over the suit property.

4. Aggrieved by it defendants No.5 and 6 preferred the above appeal.

5. The appellate court by the impugned order, pending appeal, has stayed the operation of the aforesaid judgment, order and decree vide order dated 31.3.2014 till the disposal of the appeal for which 1.5.2014 has been fixed as the next date.

6. In challenging the above order the submission of Sri Srivastava is that in exercise of power under Order 41 Rule 5 C.P.C. the appellate court has no jurisdiction to stay the operation of the judgment, order and decree rather it can only stay execution of the decree.

7. The argument advanced appears to be attractive but on a closure scrutiny I find that the stay of operation of the judgment, order and decree has the same effect as stay of execution of the decree. Moreover, the court below has the jurisdiction to stay the operation and effect of the order which is under challenge in appeal before it in exercise of its inherent power so that justice may be done to parties. Thus, the power of stay of the operation of the judgment, order and decree may not be technically available under Order 41 Rule 5 C.P.C. but is traceable to same provision in law i.e. Section 151 C.P.C.

8. It is pertinent to mention that wherever any judgment, order and decree is likely to visit a party with civil consequences and the same is under challenge, normally pending adjudication it is always better to stay the effect and operation of such an order. Thus, the appellate court in exercise of its inherent power has not committed any error in passing the impugned order.”

7. Learned counsel appearing on behalf of the opposite party lastly relies on the judgment of **Mool Chand Yadav v. Raza Buland Sugar Company Limited, Rampur** reported in **1980 0 Supreme (SC) 172**, particularly paragraph 4, which runs as follows:-

“4. We heard Mr. S.N. Kacker, learned counsel for the appellants and the respondents appeared by Caveat through Mr. Manoj Swarup, Advocate. We are not inclined to examine any contention on merits at present, but we would like to take notice of the emerging situation if the operation of the order under appeal is not suspended during the pendency of the appeal. If the F.A.F.O. is allowed obviously Mool Chand Yadav would be entitled to continue in possession. Now, if the order is not suspended in order to avoid any action in contempt pending the appeal, Mool Chand Yadav would have to vacate the room and hand over the possession to the respondents in obedience to the Court's order. We are in full agreement with Mr. Manoj Swarup, learned Advocate for respondents, that the courts order cannot be flouted and even a covert disrespect to courts order cannot be tolerated. But if orders are challenged and the appeals are pending, one cannot permit a swinging pendulum continuously taking place during the pendency of the appeal. Mr. Manoj Swarup may be wholly right in submitting that there is intentional flouting of the courts order. We are not interdicting that finding. But judicial approach requires that during the pendency of the appeal the operation of an order having serious civil consequences must be suspended. More so when appeal is admitted. Previous history of litigation cannot be overlooked. And it is not seriously disputed that the whole of the building, Hari Bhawan, except one room in dispute is in possession of the Corporation. We accordingly suspend the operation of the order dated 6/08/1982 directing the appellants to hand over the possession of the room to the respondents till the disposal of the first appeal against that order pending in the High Court of Allahabad. Mr. Manoj Swarup requests that both the earlier and later Appeals should be heard together as early as possible. We order accordingly and request the High Court if it considers proper in its own discretion to hear both the appeals as expeditiously as possible in order to avoid the continuance of the boiling situation. The appeal stands disposed of. There shall be no order as to costs.”

8. Even if we assume that the application for execution and the application for stay of judgment and decree are synonymous, even then it is the duty of the Court to assess the occupational charge to be imposed at the time of passing of the order of stay. It is a right of

exercising equitable discretionary jurisdiction of the Appellate Court. It is settled proposition of law that while ordering stay, the Appellate Court has to be alive to the fact that it is depriving successful landlord of the fruits of the decree and is postponing the execution of the order for eviction.

9. Needless to mention that the order impugned was passed without assessing any occupational charge and on that score, the order is liable to be set aside.

10. Accordingly, the order impugned dated 31st January, 2022 passed in Title Appeal No.219 of 2019 stands set aside.

11. Learned Trial Judge is directed to comply strictly with the order passed by the Co-ordinate Bench of this Court in connection with CO 1310 of 2020 in disposing of the application for stay of execution in accordance with law after giving an opportunity of hearing to both the parties to the appeal.

12. Learned Appellate Court is also requested to dispose of the said application by keeping an eye on the observation made in **Atma Ram Properties (P) Ltd.** (supra) with regard to the occupational charge.

13. The opposite party/defendant is at liberty to file necessary objection with regard to assessment of occupational charge.

14. In the aforesaid facts and circumstances, I make it clear that the learned Executing Court shall not proceed with the Title Execution Case No.108 of 2019 till the disposal of the application for stay of execution pending before the Learned Appellate Court.

15. Learned Appellate Court is also requested to dispose of the application for stay of execution within six weeks after the ensuing puja vacation.

16. With the aforesaid observation and direction, the revisional application, being CO 334 of 2022, stands disposed of.

17. All parties shall act on the basis of a server copy of this order duly downloaded from the official website of this Court.

18. Urgent photostat certified copy of this order, if applied for, be given to the parties, upon compliance of necessary formalities.

(Bibhas Ranjan De, J.)