

**(2008) 07 DEL CK 0178**

**In the Delhi High Court**

**Case No :** CM No. 4710 of 2008 in Regular First Appeal No. 72 of 2005

Capt. Praveen Davar Retd. and Another

APPELLANT

Vs

Harvansh Kumari and Others

RESPONDENT

**Date of Decision :** 17-07-2008

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, Order 41 Rule 5, Order 41 Rule 5(1), Order 41 Rule 5(3), 151  
Delhi Rent Control Act, 1958 — Section 50  
Punjab Urban Rent Restriction Act, 1941 — Section 10

**Citation :** (2008) 153 DLT 204

**Hon'ble Judges :** Mukul Mudgal, J; Manmohan, J

**Bench :** Division Bench

**Advocate :** A.K. Singh and Pankaj Gupta, for the Appellant; Ravi Nath and P.K. Jain, for the Respondent

## **Judgement**

Manmohan, J.—The Respondent/plaintiffs have filed the present application being CM No. 4710/2008 u/s 151 of CPC praying for a direction to the Appellant/Defendants to deposit a sum of Rs. 2,00,000/- (Rupees Two Lakhs only) per month as compensation for use and occupation of the suit premises from December 1994 till final decision in the present appeal.

2. Briefly stated the material facts for this application are that the Appellant/Defendants in the year 1995 had filed a suit for recovery of possession and damages in respect of first floor of the premises bearing No. B-32, Connaught Place, New Delhi - 110 001, hereinafter referred to as the "suit premises". The said suit premises admittedly comprises of three bed rooms, kitchen, bathroom, verandah facing the Central Park, Connaught Place.

3. On the basis of the pleadings of the parties, the trial court framed the following issues:

(i) Whether the plaintiff are owners and landlords? OPP

- (ii) Whether the suit is barred by Section 50 of the DRC Act? OPD.
- (iii) Whether the plaintiff is estopped from bringing the present suit in view of the averments in para No. 3 of the Written Statement of defendant No. 1 to 4? OPD.
- (iv) Whether the tenancy of the defendant is terminated by a valid and legal notice? If not, its effect. OPP.
- (v) Whether the defendants are still continuing as tenants? OPD.
- (vi) Whether the premises were taken for residential-cum-commercial purpose? OPD.
- (vii) Whether the plaintiff is entitled for the possession of the premises as claimed? OPP.
- (viii) Whether suit is barred by res judicata? OPD.
- (ix) Whether the plaintiff is entitled for the damages as claimed? If so, at what rate? OPP.
- (x) Relief.

4. On 11th January, 2005 the trial court passed a preliminary decree of possession of the suit premises in favour of the Respondent/plaintiffs, but directed a further enquiry to be held under Order 20 Rule 12 of CPC in respect of mesne profits/damages to be paid by the Appellant/Defendants herein for unauthorized occupation of the suit premises.

5. However, on the present appeal being filed, this Court on 7th February, 2005 admitted the matter and in the interregnum the learned Counsel for the Respondent/plaintiffs undertook not to obtain warrants of possession of the suit premises. While the present appeal was pending final disposal, the Respondent/plaintiffs have filed the present application seeking payment of the interim compensation as detailed hereinabove.

6. In the present application, the Respondent/plaintiffs have stated that the owners are all senior citizens who, after several years of court battle, have obtained a decree for possession. But, they have not received any rent/occupation charges for the suit premises since 1989. The Respondent/plaintiffs have further alleged that the Appellant/Defendants are two of the five children of the original tenant who had died about 30 years ago and further the tenant's wife who was a statutory tenant had also died about 15 years ago. In this application it has further been stated that the present appeal has been pending adjudication in this Court for last about three years and the market rent of the suit premises is approximately Rs. 2,00,000/- per month.

7. Though the Appellant/Defendants admit that they are in occupation of the suit premises, they claim that rents of first floor properties in Connaught Place are abysmally low as said properties can be used only for residential purposes. The Appellant/Defendants further allege that during the last 5 to 7 years there has

been no letting out of first floor properties in Connaught Place as no person is willing to take premises in that area for residential purpose and further letting out of such premises for commercial use is legally not permissible. The Appellant/Defendants further claim that the finding of the trial court with regard to issue No. 4 is untenable in law since it has been passed without even considering the mandatory provision of Section 10 of the Punjab Urban Rent Restriction Act, 1941.

8. In our view, Order 41 Rule 5 of CPC gives power and jurisdiction to the appellate court to put the appellant on such reasonable terms as would in the courts opinion reasonably compensate the decree holder for loss occasioned by delay in execution of the decree by the grant of a stay order. The relevant Sub-Rules (1) and (3) of Rule 5 of Order 41 of CPC are reproduced hereinbelow:

#### 5. Stay by Appellate Court

(1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree....

(3) No order for stay of execution shall be made under Sub-rule (1) or Sub-rule (2) unless the Court making it is satisfied-

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

9. The Apex Court in the case of Atma Ram Properties (P) Ltd. Vs. Federal Motors Pvt. Ltd., has also held as under:

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. In *South Eastern Coalfields Ltd. v. State of M.P. and Ors.* this Court while dealing with interim orders granted in favour of any party to litigation for the purpose of extending protection to it, effective during the pendency of the proceedings, has held that such interim orders, passed at an interim stage, stand reversed in the event of the final decision going against the party successful in securing interim orders in its favour; and the successful party at the end would be justified in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand (a) the delivery to it of benefit earned by the opposite party under the interim order of the High Court, or (b) compensation for what it has lost, and to grant such relief is the inherent jurisdiction of the Court. In our opinion, while granting an order of stay under Order 41 Rule 5 of the CPC, the appellate court does have jurisdiction to put the party seeking stay order on such terms as would reasonably compensate the party successful at the end of the appeal in so far as those proceedings are concerned. Thus, for example, though a decree for payment of money is not ordinarily stayed by the appellate Court, yet, if it exercises its jurisdiction to grant stay in an exceptional case it may direct the appellant to make payment of the decretal amount with interest as a condition precedent to the grant of stay, though the decree under appeal does not make provision for payment of interest by the judgment-debtor to the decree-holder. Robust commonsense, common knowledge of human affairs and events gained

by judicial experience and judicially noticeable facts, over and above the material available on record - all these provide useful inputs as relevant facts for exercise of discretion while passing an order and formulating the terms to put the parties on. After all, in the words of Chief Justice Chandrachud, speaking for the Constitution Bench in *Olga Tellis and Ors. v. Bombay Municipal Corporation and Ors.* - "commonsense which is a cluster of life's experiences, is often more dependable than the rival facts presented by warring litigants"....

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 (I) 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.

10. Following the aforesaid judgment, one of us Hon''ble Mr. Justice Mukul Mudgal vide judgment and order dated 7th April, 2008 in *C.E. Construction Ltd. v. Mr. Ajay Relan and Ors.* in CM No. 1773/2008 in EFA (OS) No. 05/2008 held as under:

...it is amply clear that the Appellate court is not bound to grant an order of stay merely because an appeal has been preferred and an application for an order of stay has been made. An applicant who comes to the court for seeking a stay order must do equity for seeking equity. While granting an order of stay under Order 41 Rule 5 of the CPC the appellate court does have the jurisdiction to put the parties seeking the stay order on such terms, as would in its opinion reasonably compensate the decree holder, for the loss occasioned by the delay in the execution of the decree by the grant of stay order....

11. Since the trial court has categorically held that the Appellant/Defendants are not entitled to the continued possession of the suit premises and the trial court has not calculated the use/occupation charges, we deem it necessary ourselves

to compute the occupation charges payable by the Appellant/ Defendants for continued possession of the suit property during the pendency of the present appeal, taking judicial notice of the rents prevalent in this area as well as the exponential increase in the rents every year. It is pertinent to mention that it was the Appellant/Defendants' case before the trial court that the suit premises had been initially let out to them both for commercial as well as residential use.

12. Consequently, we direct the Appellant/Defendants to deposit in this Court from the date of filing of application i.e. 24th March, 2008 a sum of Rs. 30,000/- per month. The aforesaid amount shall be deposited on or before 1st November, 2008. Thereafter every month the Appellant/Defendants shall deposit a sum of Rs. 30,000/- per month on or before 10th of each month. In case there is failure to make the above payments within the stipulated period mentioned above, the interim arrangement that the Respondent/plaintiffs would not obtain warrants of possession shall be liable to be vacated. The amount so deposited by the Appellant/Defendants shall be invested in a short term fixed deposit for a period of one year by the Registry of this Court. The principal and interest amount shall enure for the benefit of the successful party in the present appeal.

13. With these observations, the present application stands disposed of.