
(2019) 03 CAL CK 0116

In the Calcutta High Court

Case No : Appeal From Order (APO) No. 51 Of 2019, General Application
(GA)No. 570 Of 2019 With Civil Suits (CS) No. 152 Of 2017

Shyam Sel & Power Limited

APPELLANT

Vs

Bahubali Promoters Private Limited

RESPONDENT

Date of Decision : 28-03-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Section 10, 151, Order 2 Rule 2, Order 2 Rule 4
West Bengal Premises Tenancy Act, 1997 — Section 6(4)

Citation : (2019) 03 CAL CK 0116

Hon'ble Judges : Soumen Sen, J;Ravi Krishan Kapur, J

Bench : Division Bench

Advocate : Ranjan Bachawat, Rudraman Bhattacharya, Manoj Kumar Tiwari,
Suvasish Sengupta, Jishnu Chowdhury, Soumabho Ghose, Aritra Basu, Dwip Raj
Basu

Final Decision : Disposed Off

Judgement

Soumen Sen, J

This appeal is arising out of an order dated 30th January, 2019 by which the application filed for stay of CS No. 152 of 2017 (hereinafter referred to as the "said application") was dismissed.

The appellant is the defendant in Suit No. 152 of 2017.

The brief background of the said application is stated below:

The plaintiff filed a suit for eviction in 2010 before the learned City Civil Court against Shyam Engineering Company Pvt. Ltd. and Shyam Sel and Power Ltd., for recovery of an office space measuring about 2040 square feet more or less on the first floor of the premises situated at Ganesh Chandra Avenue, Kolkata (hereafter referred to as the "suit premises"). The plaintiff has prayed for eviction of Shyam Engineering Company Pvt. Ltd., inter alia, on the ground that the said tenant had sub-let the suit premises to Shyam Sel and Power Ltd. The

suit decreed on 2nd September, 2015, on contest. Shyam Sel Ltd., preferred an appeal from such decree before a Division Bench of this Court, being FA No. 174 of 2016. By an order dated 13th July, 2016, the Division Bench granted unconditional stay of all further proceedings in the execution case for a period of two weeks, subject to the appellant/defendant depositing arrear rent up to June, 2016 at the rate of last paid rent together with the decretal cost in the executing court and continuing to pay occupational charges from July 2016 till the disposal of the appeal at the rate of Rs. 2,00,000/- per month with the learned Registrar General of this Court.

On or about July, 2017, the plaintiff filed the instant suit for recovery of mesne profits on and from 8th July, 2014 for the alleged wrongful occupation of the said premises. In the suit, the plaintiff claimed mesne profits at the rate of Rs. 13,000 per diem by reason of wrongful occupation since 2014 and interest thereon from 8th July, 2014 till 7th July, 2017 at the rate of 18% p.a.

In the plaint, it is alleged that the defendant continued in possession of the suit premises as a trespasser.

Before the commencement of trial the appellant filed an application for stay of the instant suit on the ground that the decision of the Hon'ble Division Bench in F.A. No. 174 of 2016 would operate as *res judicata* in the instant suit. In view of the pendency of the appeal, the defendant cannot be treated as a trespasser and accordingly, the plaintiff is entitled to recover any mesne profits during the pendency of the appeal. In other words, it was contended that the issue in CS No. 152 of 2007 is also directly and substantially in issue in the previously instituted suit between the same parties before the Hon'ble Division Bench and without there being an adjudication as to whether the defendant is a tenant entitled to protection under the West Bengal Premises Tenancy Act, 1997, the suit on mesne profits would be premature and not maintainable. The said application was dismissed by the learned Single Judge on the ground that section 10 of the Code of Civil Procedure, 1908 would not apply in the instant case as the matter in issue in the City Civil Court cannot be said to be the matter in issue in the instant suit. It appears that the appellant had further taken a plea before the learned Single Judge that the subsequent suit for recovery of mesne profits would be barred under Order 2 Rule 2 of the Code of Civil Procedure. This objection was also overruled by the learned Single Judge by relying upon the judgment of this Court in *Santosh Kumar Ghosh & Ors. Vs. Sachindra Nath Mukherjee & Anr.* reported at (1957-58) 62 CWN 759.

The application for stay of the suit was only on the aforesaid two grounds.

However, in the appeal, the appellant had submitted that before the learned Single Judge it was argued that in any event the suit is barred under section 151 of the Code of Civil Procedure, and in support of such submission reliance was placed on a Division Bench judgment of our Court in *Jugometal Trg Republike Vs. Rungla and Sons (Private) Ltd.* reported at AIR 1966 Cal 382. However, we do

not find any reflection of such argument in the impugned judgment.

Although there is a disagreement at the bar as to whether this point was argued or not, but having regard to the fact that pure question of law can be raised at the hearing of the appeal, we permitted Mr. Rudraman Bhattacharya, learned counsel representing the appellant, to raise this issue in the appeal.

The suit for mesne profits is not barred under Order 2 Rule 2 of the Code of Civil Procedure. It is true that in the first suit no claim for mesne profits was made. However, it does not mean that the plaintiff would forfeit its right to make a claim for wrongful use and occupation of the premises in respect of which the plaintiff has obtained a decree and which property continued to remain under the occupation of the defendant even after the decree. The claim towards such use and occupation arises after the date of the decree and the decree gives the cause of action for making a claim of this nature. With regard to the past mesne profits the plaintiff had an existing cause of action on the date of the institution of the suit, with regard to the future mesne profits, the plaintiff has no cause of action on the date of the institution of the suit and hence it is pre-mature. It is not possible for the plaintiff to plead this cause of action in the earlier suit. In respect of the suit for compensation, as it happens in the instant case, has arisen subsequent to the decree in the earlier suit. It constitutes a new cause of action and as such the present suit for mesne profits is maintainable. In Santosh Kumar Ghosh (*supra*) it has been clearly stated in the following words:-

"The obligation to pay mesne profits arises from a cause of action completely different from the obligation to restore possession of the immovable property to the rightful owner. That being so Order 2 Rule 2 of the Code of Civil Procedure is no bar to the institution of a subsequent suit for mesne profits. A claim for mesne profits is not based on the same cause of action as the claim for possession. A claim for mesne profits subsequent to filing of a suit for possession is not barred property of *res judicata*."

In a fairly recent decision of the Hon'ble Supreme Court in *M/s. Raptakos, Brett & Co. Ltd. v. M/s. Ganesh Property* reported at AIR 2017 SC 4574 it is stated:-

"From a reading of the provisions of Order 2 Rule 2 and Rule 4 of the Code of Civil Procedure and the principles laid down in various decisions of our Court as well as the Hon'ble Supreme Court it is clear that under Order 2 Rule 2 read with Rule 4 the plaintiff can also claim mesne profits or arrears of rent in a suit filed for ejectment for eviction of a tenant. The plaintiff filed a fresh suit for claiming mesne profits or arrears of rent for the period subsequent to the decree passed in the earlier suit having become final. But in a case where the plaintiff has claimed mesne profits or arrears for rent in a suit filing for ejectment of the tenant and has relinquished his rights vis-a-vis mesne profits or arrears of rent in the suit proceedings itself, the provisions of Order 2 Rule 2 will come into play and in comparison to the second suit for mesne profits or arrears of rent till the decree, the earlier suit will attain finality."

Hence the learned Single Judge in our view has correctly held that bar under Order 2 Rule 2 would not apply in the instant case.

Mr. Ranjan Bachawat learned Senior counsel appearing on behalf of the appellant has strenuously argued that the suit for mesne profits is barred under Section 10 of the Code of Civil Procedure on the premise that the decree passed in the earlier suit for eviction is under appeal and appeal is a continuation of the suit. Mr. Bachawat, in this regard relied upon a three Judge Bench decision of the Hon'ble Supreme Court in *Union of India (UOI) & Ors. v. West Coast Paper Mills Ltd. & Ors.* reported at AIR 2004 SC 1596:- (2004)2 SCC 747 (paragraph14) and has submitted that it has been clearly stated in the said decision that in an appeal from the decree the Appellate Court would be entitled to go through the questions of fact as well as law and in that sense the correctness of the judgment in appeal is in jeopardy. In the present suit the plaintiff would be required to establish that the appellant was in wrongful possession and hence entitled to mesne profits for the period under such wrongful occupation and even thereafter till the possession is delivered. Mr. Bachawat submits that the Appellate Court would be required to decide whether the appellant is liable to be evicted under the provisions of the West Bengal Premises Tenancy Act. Hence the question of any mesne profits in the present action is dependent upon the adjudication in the appeal as to whether the appellant is liable to be evicted under the West Bengal Premises Tenancy Act. The decree, in view of the appeal, is not final inasmuch as the appellant is enjoying an order of stay of execution of the decree on terms and conditions which the appellant had fulfilled and is complying with all directions of the Hon'ble Division Bench. Mr. Bachawat submits that since the appeal is in continuation of a suit, the question of unauthorised occupation of the defendant would come up for consideration in the appeal and it squarely fits into the expression "the matter in issue is directly and substantially in issue" in the previously instituted suit, namely, the suit for eviction and hence the second suit for mesne profits is liable to be stated under Section 10 of the Code of Civil Procedure. Mr. Bachawat submits although a Division Bench of our Court in *J.T. Republike v. Rungta & Sons* reported at AIR 1966 Cal 382 has held that a suit under Section 151 of the Code of Civil Procedure can be stayed, but it appears that the said judgment has not taken into consideration an earlier Supreme Court judgment of *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal* reported at AIR 1962 SC 527 wherein it has been held that when there is an express provision in the code, any departure therefrom is not permissible. Mr. Bachawat submits that since Section 10 is the ruling section recourse cannot be had under Section 151 of the Code of Civil Procedure although that might be the view expressed by the Division Bench in *J.T. Republike* (supra).

Per contra Mr. Jishnu Chowdhury learned counsel representing the petitioner submits that the causes of action in both the suits are different. The matter in issue in the City Civil Court suit is different from the matter in issue of the present suit. The suit before the City Civil Court is for eviction due to sub-letting whereas the instant suit is for recovery of mesne profits. It matters little as to

whether the cause of action of the present suit may have some connection with the decree passed in the earlier suit. In fact, an independent suit for mesne profits is maintainable without even referring to the decree passed by the City Civil Court. Mr. Chowdhury submits that in deciding an application under Section 10 of the Code of Civil Procedure the Court needs to ascertain if there is an identity of the matter in issue in both suits are same, in other words, Section 10 would apply only when whole of the subject-matter in both the proceeding is identical. Since in the instant case, the whole of the subject-matter are not identical and based on different cause of action, Section 10 of the Code of Civil Procedure would not apply. Mr. Chowdhury in this regard has relied upon a decision of the Hon'ble Supreme Court *National Institute of Mental Health & Neuro Sciences v. C. Parameshwara* reported at AIR 2005 SC 242: 2005(2) SCC 256 (paragraph 8). Mr. Chowdhury has relied upon *Manohar Lal Chopra* (supra) to argue that recourse to Section 151 of the Code of Civil Procedure cannot be taken to nullify the provisions of the code, namely, Section 10 of the Code of Civil procedure. Mr. Chowdhury submits that the appellant has to establish that Section 10 applies in the instant case and whole of the subject-matter in both the suits are identical failing which the appeal must fail.

The underlying object of the rule contained in Section 10 of the Code of Civil Procedure is to prevent Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject-matter and the same relief. The basic purpose is to protect a person from multiplicity of proceedings as also to avoid conflict of decisions. The true intent of the said Section is that common matters in issue in two suits ordinarily be decided in a previously instituted suit. The object of the prohibition contained in Section 10 is considered in *Indian Bank Vs. Maharashtra State Co-operative Marketing Federation Ltd.*, reported in (1998) 5 SCC 69. The Hon'ble Supreme Court at page 72 of the said reports stated as follows:-

"The object of the prohibition contained in Section 10 is to prevent the Courts of concurrent jurisdiction from simultaneously trying two parallel suits and also to avoid inconsistent findings on the matter in issues. The provision is in the nature of a rule of procedure and does not affect the jurisdiction of the Court to entertain and deal with the later suit nor does it create any substantive right in the matter. It is not a bar to the institution of the suit. It has been construed by the Court as not a bar of the passing of interlocutory order such as an order for consolidation of the later suit with the earlier suit, or appointment of a receiver or an injunction or attachment before judgment." The Privy Council in *Annamalay Chetty Vs. Thornhill*, reported in A.I.R. 1931 PC 263 observed that if the decision in one suit would have the effect of being *res judicata* in respect of the issues arising in the subsequently instituted suit, then it would not be proper to proceed with the trial of the very same issues in a subsequently instituted suit. In the words of Blackwell, J, (*Durgaprasad Vs. Kantichandra*, reported in A.I.R. 1935 Cal. 1), the test is whether the previously instituted suit and subsequently suit were parallel, that is to say, if the first suit was determined, the question

raised in the second suit would be barred by the doctrine of res judicata. In other words, if by the decision in the previously instituted suit, the subsequent suit would fail as a whole on the principle of res judicata, the subsequent suit must be stayed.

In fact, a learned Single Judge of this Court in *Ashok Kumar Yadav Vs. Noble Designs Pvt. Ltd.*, reported in A.I.R. 2006 Calcutta 237 held that for determining whether the matter in issue in a subsequently instituted suit is directly and substantially issue in previously instituted suit, absolute identity of parties in both the suits is not a relevant consideration. The relevant observations of the learned Single Judge are set out hereinbelow:-

"11. The hotly debated point is whether the matter in issue in the Calcutta suit is directly and substantially in issue in the Patna suit. In my view, for answering the question in the present case, it will not be necessary to discuss the authorities cited to me in detail. There is no dispute regarding the proposition that the expression "matter in issue" shall mean (as said by the Apex Court in *Mathura Prasad*) (AIR 1971 SC 2355). "The right litigated between the parties, i.e., the facts on which the right is claimed or denied and the law applicable to the determination of that issue." In other words, the expression means the whole subject-matter; that is to say, the entire controversy between the parties. In my view, if the present case is tested by applying this proposition, it cannot be held that the matter in issue in the Calcutta suit (the subsequently instituted suit) is directly and substantially in issue in the Patna suit (the previously instituted suit).

12. The subject-matter of the Patna suit is the agreement for sale on the basis whereof the defendant in the Calcutta suit, as plaintiff there, prayed for a decree for specific performance of contract. The power of attorney originated from that agreement. In the absence of the agreement the power of attorney simply becomes non-est; it will not have any independent existence. That is to say, unless the agreement exists, the power of attorney cannot survive. So the question of validity of the agreement is the whole controversy between the parties in the Patna suit. I have no hesitation in saying that the same controversy is the whole subject-matter of the Calcutta suit. The decree for declaration that the power of attorney stood cancelled has been sought on the ground that the sale agreement stood cancelled. The power of attorney was not an instrument capable of existence once severed from the agreement for sale, it was born out of Cl. 17 of the agreement.

13. The whole controversy in the Calcutta suit is whether it stood cancelled consequent upon determination of the agreement, as claimed by the plaintiff. Thus it cannot be said that the whole subject-matter of the Calcutta suit is not identical with the subject-matter of the Patna suit. The controversy between the parties being one and the same, I am unable to hold that the matter in issue in the Calcutta suit is not directly and substantially in issue in the Patna suit. In my opinion, the decision in the Patna suit will make the Calcutta suit absolutely useless and academic. Nothing of any substance will remain for decision in the

Calcutta suit.

14. For these reasons I hold that the trial of Calcutta suit should remain stayed, and that the S. 10 application should be allowed. I accordingly allow the application, and order that till the disposal of the Patna suit trial of the Calcutta suit shall remain stayed."

In order to attract the provision of Section 10 of Code of Civil Procedure, the following conditions are required to be fulfilled.

- i. Two suits- one previously instituted and the other subsequently instituted;
- ii. Matter in issue-The matter in issue in both the suits must be same meaning thereby the entire subject matter of the two suits must be same and identical. It is however, not necessary for the applicability of this Section that all the issues in the previously instituted suit must also be the issues in the subsequently instituted suit, nor it is essential that the reliefs claimed in both the suits should be identical;
- iii. Same parties;
- iv. Pendency of suit;
- v. Same relief : it is essential that the Court in which the first suit is pending must be competent to grant the relief claimed in that suit and also the relief claimed in the second suit (Mitra Lina Pr. Ltd. Vs. The Finlay Mills Ltd. & Anr, A.I.R. 1982 Cal. 41);

In National Institute of Mental Health & Neuro Sciences (Supra), the Hon'ble Supreme Court was considering the applicability of Section 10 in relation to the proceedings initiated before the Labour Court under the Industrial Disputes Act, 1947 and another proceeding before the Civil Court. In the said decision, it was held as under:-

"the cause of action in filing Suit No.1732 of 1995 is the loss suffered by the appellant on account of the misappropriation of drugs by the respondent, established in the departmental enquiry against him wherefore he was also removed from service. On the other hand, in the said Writ Petition No.24348 of 2002, the management has challenged the award of the Labour Court granting reinstatement of the respondent. Both the proceedings operated in different spheres. The subject-matter of the two proceedings is entirely distinct and different. The cause of action of the two proceedings is distinct and different."

In paragraph 8 of the said report it is state:

"8. The object underlying Section 10 is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. The object underlying Section 10 is to avoid two parallel trials on the same issue by two Courts and to avoid recording of conflicting findings on issues which are directly and substantially in issue in previously instituted suit.

The language of Section 10 suggests that it is referable to a suit instituted in the civil Court and it cannot apply to proceedings of other nature instituted under any other statute. The object of Section 10 is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue. The fundamental test to attract Section 10 is, whether on final decision being reached in the previous suit, such decision would operate as res-judicata in the subsequent suit. Section 10 applies only in cases where the whole of the subject matter in both the suits is identical. The key words in Section 10 are "the matter in issue is directly and substantially in issue" are used in contra-distinction to the words "incidentally or collaterally in issue". Therefore, Section 10 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of subject matter in both the proceedings is identical."

This decision has recently come up for consideration in *Aspi Jal and Ors. vs. Khushroo rustom Dadyburjor* reported at (2013) 4 SCC 333 in which the Hon'ble Supreme Court has explained what is mean "by matter in issue". It was held:-

"The key words in Section 10 are "the matter in issue is directly and substantially in issue in the previously instituted suit". The test for applicability of Section 10 of the Code is whether on a final decision being reached in the previously instituted suit, such decision would operate as res-judicata in the subsequent suit. To put it differently one may ask, can the Plaintiff get the same relief in the subsequent suit, if the earlier suit has been dismissed? In our opinion, if the answer is in affirmative, the subsequent suit is not fit to be stayed. However, we hasten to add then when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit." (emphasise supplied)

The key words in Section 10 are "the matter in issue is directly and substantially" in issue in the previous suit. The words "directly and substantially in issue" are used in contradiction to the words "incidentally or collaterally in issue". Section 10 relates to the principle of res sub-judice, that is, a matter which is pending judicial adjudication. The object of the section is to protect the parties from being vexed twice for the trial of the same cause. In other words, the purpose of Section 10 is to prevent competent Courts of concurrent jurisdiction from having to try parallel suits, in respect of the same matter in issue and thereby to pave the way for the Court to really see if the decision of the matter directly and substantially in issue in the former suit will or will not lead to the decision directly and substantially in issue in the subsequent suit and if it is satisfied that it will then it must stay the trial of the subsequent suit and await the decision in the former suit.

In the instant case the plaintiff has based its cause of action on the decree for eviction dated 22nd September, 2015. The claim for mesne profits is based on the decree passed on 22nd December, 2015 in the suit filed before the City Civil Court. This would be evident from paragraphs 2, 3, 4 and 5 of the plaint. The said paragraphs read:

"2. By a notice dated 20th January, 2005, issued under Section 6(4) of the West Bengal Premises Tenancy Act, 1997, the tenancy of Shyam Engineering Company Private Limited was terminated. A copy of the said notice is annexed hereto and marked with the letter "B". Shyam Sel & Power Limited (formerly known as Shyam Sel Limited), the defendant herein, had been illegally inducted into possession in respect of the suit premises by Shyam Engineering Company Private Limited, since long before July, 2014.

3. In the said circumstances, Ejectment Suit No. 4 of 2010 was filed before the Learned City Civil Court at Calcutta by the plaintiff, which has resulted in a decree for eviction dated 22nd September, 2015 against both Shyam Engineering Company Private Limited and the defendant herein. A copy of the judgment and decree dated 22nd September, 2015 is annexed hereto and marked with the letter "C".

4. The defendant has thereafter preferred an appeal being F.A. No. 174 of 2016. In the said appeal an interim order dated 13th July, 2016, was passed by the Division Bench of this Hon'ble Court, a copy whereof is annexed hereto and marked with the letter "D". The appeal is pending adjudication.

5. The defendant is continuing in possession of the suit premises as a trespasser in respect thereof. The defendant has no right to remain in occupation of the suit premises."

In *Union of India v. West Coast Paper Mills Ltd.* reported at (2004) 2 SCC 747, the principle that "an appeal is in continuation of suit" has been reiterated (See also: *Lachmeshwar Prasad Shukul & Ors. vs. Keshwar Lal Chaudhuri & Ors.* reported at AIR 1941 Federal Court 5 and *Karan Singh & Ors. vs. Bhagwan Singh (dead)* by L.Rs. & ors. reported at (1996) 7 SCC 559).

As observed in *Jugometal Trg Republike* (supra) a suit within the meaning of Section 10 includes an appeal just what has been held by Rankin, J. (as his Lordship then was) in *Jamini Nath Mallik v. Midnapur Zemindary Co.*, AIR 1923 Cal 716 and also by Sir Asutosh Mookerjee who observes in *Bepin Behari's Case*, 24 Cal LJ 514: (AIR 1917 Cal 248):

"It is plain that it section 10 is otherwise applicable, its operation is not excluded by the fact that the previously instituted suit has reached the stage of an appeal".

It further proceeds to state:

"This is clear from the use of the expression "Before His Majesty in Council", and this view was expressly adopted in the case of *Chinnakaruppan Chetty, A.L.M.S.S. v. M.V.M. Meyappa Chetty* reported at (1915) 30 IC 753, where it was pointed out that proceedings on appeal are for many purposes deemed only a continuation of the suit instituted in the first Court, *Pichuvayyanganar v. Seshayyanganar* reported at (1895) 18 Mad 214 (FB) and *Kristnama Chariar v. Mangammal* reported at (1903) 26 Mad 91 (FB). Consequently, the mere fact that the decree in the previously instituted suit is under appeal in this court, does

not enable the plaintiffs to invite us to hold that S. 10 is inapplicable."

An appeal is a valuable right of the litigant and the parties have a right to be heard both on questions of law and on facts (See: C. Venkata Swamy vs H.N. Shivanna reported at (2018) 1 SCC 604; Santosh Hazari vs. Purushottam

Tiwari (Deceased) by L.Rs. reported at (2001) 3 SCC 179; and H.K.N. Swami v. Irshad Basith reported at (2005) 10 SCC 243).

The question in the instant case reduces to this: "Is the matter in issue in the subsequently instituted suit for mesne profits also directly and substantially in issue in the previously instituted suit namely for eviction?

"

The decision in the earlier suit against the appellant, by which the appellant was held to be in unauthorised occupation and hence treated to be trespasser, is now pending for final adjudication in F.A. No. 174 of 2016. In the present suit, that is, G.A. 152 of 2017, from a perusal of the paragraphs in the plaint set out hereinbefore, the primary question in the instant suit is whether the defendant has been lawfully or unlawfully inducted in the suit premises and whether its continued possession is with or without the authority of law. We are of the view that there is substantial identity of the matters in issue in both the suits.

The suits are between the same parties litigating under the same title and that requirement of the Code is fulfilled. The expression "the matter in issue" has reference to the entire subject matter in controversy between the parties. (See. Bepin Behary Mozumdar (supra)).

The Court under the inherent power can stay initiation or continuation of any proceeding, if it appears to be vexatious, oppressive and abuse of the process of the Court. In such a situation the Court need not be guided by the principle of Section 10 of the Code of Civil Procedure and can exercise the inherent powers of the court for the ends of justice. Accordingly, we are of the view that Section 10 would not be the only provision that governs stay of suits. However, it would depend upon the facts of each case and for the courts to record its satisfaction that continuation of such proceeding would be vexatious or harrassive or oppressive or abuse of the process of the Court.

In the instant case any reversal of the decree by the appellate Court would non-suit the plaintiff in the present proceeding. The appellant did not apply for stay of the operation of the decree as the present suit was filed after the decree was passed in favour of plaintiff for realisation of mesne profits. The execution of the decree, however, has been stayed which in effect means that the decree cannot be enforced. Effectively it is stay of operation of the decree. The rights of the parties are in suspended animation.

On such consideration we accept the submission made by Mr. Bachwat appearing on behalf of the appellant and set aside the impugned order. C.S. No.152 of 2017

shall remain stayed till the disposal of F.A. No. 174 of 2016.

Urgent Photostat certified copy of this judgment, if applied for, be given to the parties on an usual undertaking.

I agree